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23-60

No. 12091.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF EDWIN W. RICKENBERG,

Deceased.

LORAIN T. RICKENBERG, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

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FEB 12 1943

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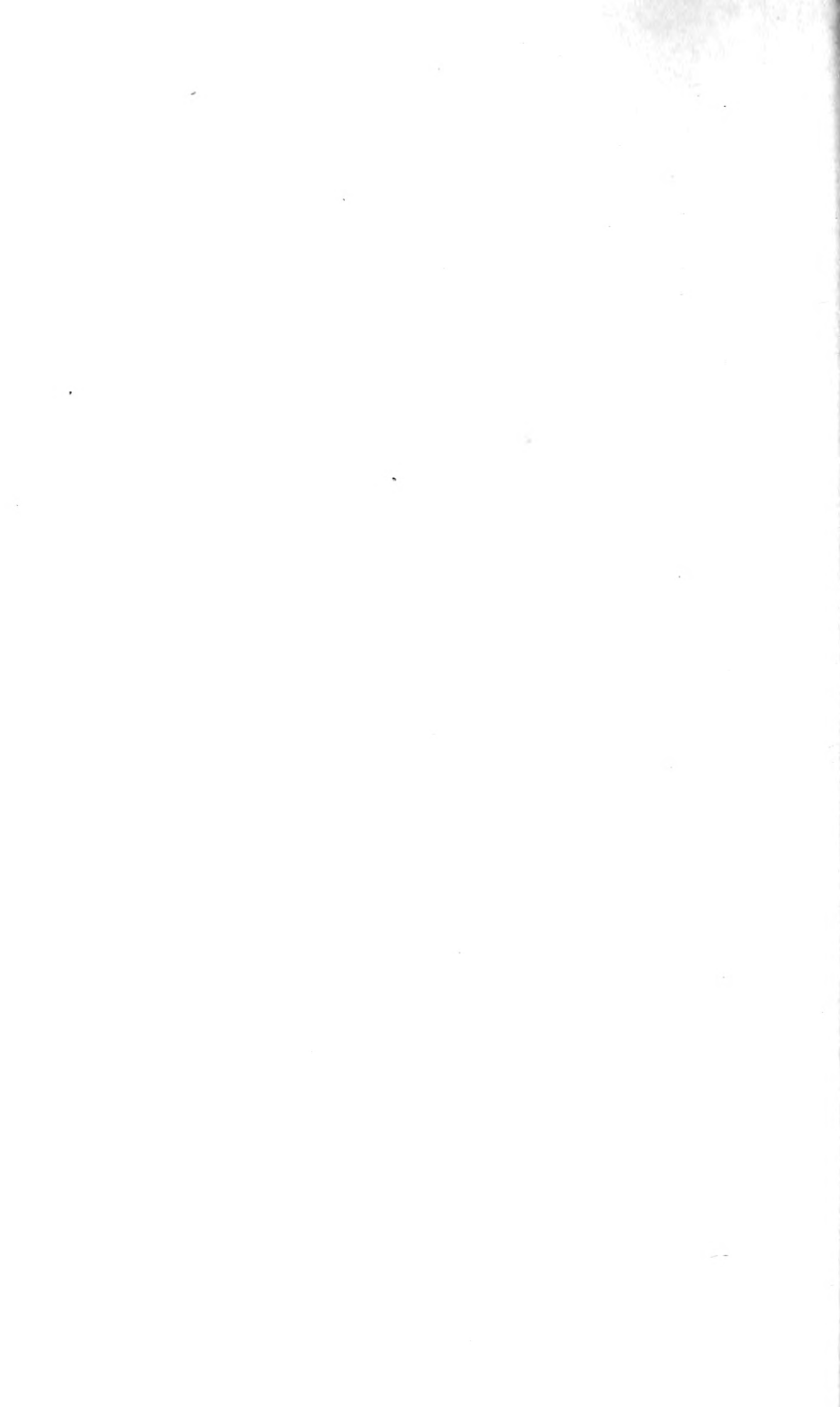
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No. 12091.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF EDWIN W. RICKENBERG,

Deceased.

LORAIN T. RICKENBERG, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

Jurisdictional Statement.

Loraine T. Rickenberg, executrix of the Estate of Edwin W. Rickenberg, Deceased, your petitioner, seeks the re-determination of a deficiency in federal estate tax determined by the respondent. The decedent, a resident of Pomona, California, died August 23, 1944. Your petitioner is the duly appointed, qualified, and acting executrix of his estate, and duly filed with the Collector of Internal Revenue for the Sixth Collection District of California a federal estate tax return for the estate, and paid the tax reported thereon in the amount of \$32,150.00. On May 3, 1946, within the time prescribed by Sec. 874,

and under the authority of Sec. 871(a) of the Internal Revenue Code, the respondent sent a Notice of Deficiency in respect of estate tax to your petitioner. Your petitioner duly filed with the Tax Court of the United States a petition for a re-determination of the deficiency. Jurisdiction of the proceeding is conferred upon The Tax Court of the United States by Sec. 871(a) and Sec. 1101 of the Internal Revenue Code. The decision of The Tax Court was entered September 22, 1948. Jurisdiction for review of said decision in this Court is founded upon Secs. 1141 and 1142 of the Internal Revenue Code. The pleadings necessary to show the existence of jurisdiction are the petition [R. 3] and answer thereto [R. 12]. From the decision of The Tax Court [R. 44] determining a deficiency in estate tax in the amount of \$39,588.81, your petitioner has filed her Petition for Review by this Court [R. 45].

Statutes and Regulations Relied Upon.

This case arose under certain amendments made to the Internal Revenue Code by the Revenue Act of 1942. Provisions taxing community interests in the same manner as joint interests were added to the Code for estate tax, and a provision taxing gifts of community property was also added to the Code for gift tax purposes. The provisions for estate tax of community interests are contained in Sec. 402 of the Revenue Act of 1942, whereby Secs. 811(d)(5) and 811(e)(2) were added to the Code. Sec. 453 of the Revenue Act of 1942 added Sec. 1000(d) to the Code providing for a gift tax on community property. These amendments affecting community property were in force and effect during the period in which the decedent died as a resident of a community property state, Califor-

nia. Secs. 811(d)(5) and 811(e)(2) were specifically repealed by Sec. 351 of the Revenue Act of 1948, effective with respect to estates of decedents dying after December 31, 1947. Sec. 1000(d) of the Code was amended by Sec. 371 of the Revenue Act of 1948, to be applicable only to gifts made after the calendar year 1942 and on or before the date of the enactment of the Revenue Act of 1948. The date of enactment was April 2, 1948.

The provisions of the Internal Revenue Code controlling in the premises are Sec. 811(a), (c), (d)(5), and (i), and are set out in the appendix hereto, as are the related gift tax provisions and applicable Treasury regulation.

Statement of the Case and Questions Involved.

This case involves the correctness of the deficiency in respect of the federal estate tax liability of the estate of the decedent determined by the respondent and affirmed by The Tax Court. The basis of the determination by the respondent is that the decedent and his surviving spouse, prior to December 2, 1942, owned their property in joint tenancy, and on that day the title to the properties was transferred to decedent and his wife as tenants in common, and that the transfer by the decedent of his joint-held property of a value of \$124,560.94 was includible in the gross estate under the provisions of Secs. 811(c) and 811(d)(5) of the Internal Revenue Code. The alleged transfer was the result of an agreement entered into on December 2, 1942, between decedent and his surviving spouse whereby it was declared that the property which they held in joint tenancy was community property and henceforth would be owned by them as tenants in common.

The facts are set forth in the opinion of The Tax Court [R. 15-28].

Petitioner duly filed federal estate tax return for decedent's estate and included therein one-half of the real estate of an agreed total value of \$70,700.00; one-half of the 1675 shares of common stock of the J. C. Penney Co. of an agreed total value of \$177,712.00 owned by decedent and his wife at the date of his death; but included all the 40 shares of capital stock of the Home Builders' Loan Association of Pomona, California, of an agreed value of \$9,000.00; all of certain United States Treasury bonds of an agreed value of \$6,397.13; and all the bank account in the amount of \$23,988.66 and two automobiles in the respective agreed values of \$1,415.00 and \$1,280.00; but omitted the household furniture in an agreed value of \$1,500.00. Life insurance in the agreed value of \$53,703.84 was also included in the return.

The household furniture in the total value of \$1,500.00 was included in the gross estate by the respondent. Seven hundred fifty dollars of the amount was included as the value of decedent's one-half share. The remaining \$750.00 was included in decedent's gross estate, together with one-half of the agreed values of the real estate and the 1675 shares of stock of the J. C. Penney Co. under the provisions of Secs. 811(c) and 811(d)(5) of the Internal Revenue Code.

The respondent determined that the real property and shares of stock and the household furniture were owned by the decedent and his wife as joint tenants, and that in December, 1942, the title to those properties was transferred to decedent and his wife as tenants in common.

Certain other minor adjustments were made to the gross estate by the respondent, but these were waived at the hearing before The Tax Court.

Petitioner duly filed with The Tax Court of the United States a petition placing in issue:

- (a) The determination of the Commissioner that the value of one-half of the real property and the 1675 shares of stock of the J. C. Penney Co. owned by the decedent prior to December 2, 1942, was includible in his gross estate as a transfer made in contemplation of death;
- (b) That the value of the household furniture was erroneously determined to be \$1,500.00;
- (c) That the Commissioner erroneously failed to determine that a piano was the separate property of decedent's spouse;
- (d) That the Commissioner had erroneously failed to determine that only one-half of the value of the life insurance policies should be included in the gross estate since the entire value had been included in the estate tax return;
- (e) That the Commissioner had erroneously failed to determine that decedent owned only an undivided one-half interest in the property held by himself and his wife at the date of his death.

In the petition an overpayment was claimed because of the erroneous inclusion of the full value of the life insurance policies and the erroneous inclusion of the full value of certain of the properties owned by decedent and his surviving spouse in tenancy in common at the time of his death.

At the hearing the following issues were waived:

- (b) The value of the household furniture;
- (c) The piano;
- (d) The value of the life insurance policies.

The trial was had upon the issue of the inclusion in the gross estate of the full value of the real property and 1675 shares of stock of the J. C. Penney Co. and the claimed overpayment resulting from the erroneous inclusion in the gross estate by the petitioner of the full value of the 40 shares of capital stock of the Home Builders' Loan Association of Pomona, California, the United States Treasury bonds, the bank account, and the two automobiles, and because of deductions allowable in computing the net estate arising from expenses incurred in the prosecution of the appeal, which were then undetermined.

The Tax Court after the hearing entered its finding of fact and opinion sustaining the respondent, but provided in the opinion that petitioner incurred certain expenses in connection with the administration of the estate and the appeal which were not determinable, and that effect should be accordingly given in the determination of the amount of the deficiency.

Following the entry of the opinion, respondent filed a computation of the estate tax and the deficiency due, in which your petitioner acquiesced, subject to right of appeal, which computation reduced the deficiency to the sum of \$39,588.81. On September 22, 1948, The Tax

Court entered its decision determining a deficiency in accordance with this computation [R. 44]. From this decision petitioner filed her Petition for Review by this court [R. 45-53].

The questions involved in this review are:

1. Whether the property owned by decedent and his wife prior to the agreement of December 2, 1942, was held in joint tenancy or in community?

This question is raised by the holding of The Tax Court that said property was held in community, contrary to the contention of the petitioner and the determination of the respondent in the deficiency notice, and raised for the first time at the hearing by respondent.

2. Whether a transfer of an interest in property was made by decedent by the agreement of December 2, 1942, irrespective of ownership in joint tenancy or property held as community property?

This question is the necessary first step in the basic inquiry, and The Tax Court assumed the affirmative. No new issue is presented, but the legal concept of the word "transfer" as used in the statute must be established before the statute can apply.

3. Whether Sec. 811(c) was made applicable by Sec. 811(d)(5) of the Internal Revenue Code to divisions of community property between spouses upon death of one, or did it apply only to transfers by the spouses to a third party or parties? This question is inherent in the interpretation of Sec. 811(d)(5). The statutory language re-

fers only to transfers by decedent and surviving spouse. The respondent in his regulations included a division between spouses as being within the statute. The Tax Court agreed. Petitioner contends the regulation is invalid in this respect.

4. Whether a transfer by decedent to his wife of his interest in property held in joint tenancy with her which in law is not subject to testamentary disposition, was within the statute?

This question arises through the failure of The Tax Court to hold that decedent and his surviving spouse held their property in joint tenancy.

5. Whether the decedent entered into the agreement of December 2, 1942, for the primary and dominant purpose of escaping estate taxes?

This question of fact arises from The Tax Court's holding such was the motive.

6. Whether a primary and dominant purpose to escape estate taxes as a matter of law constitutes the agreement of December 2, 1942, a transfer of an interest in property made by decedent "in contemplation of or intended to take effect in possession or enjoyment at or after his death" within the meaning of Sec. 811(c) of the Internal Revenue Code?

This question of law arises through the erroneous holding of The Tax Court that such a motive was alone sufficient to bring the agreement within the statute. *Denniston v. Commissioner* (C. C. A. 3, 1939), 106 F. 2d

925, on the precise point is *contra*. In *Allen v. Trust Company of Georgia* (1946), 326 U. S. 630, the Supreme Court refused to decide it is. The Tax Court, in the latest decision on the point in *Estate of Charles J. Rosebault, Laura D. Rosebault, Executrix*, January 5, 1949, 12 T. C. No. 1, held exactly opposite.

7A. Whether by the agreement of December 2, 1942, a *bona fide* sale for an adequate and full consideration in money or moneys worth took place between decedent and his wife within the exception provided in Sec. 811(c) of the Internal Revenue Code?

7B. If a *bona fide* sale did not take place, whether there existed any excess in value of the property transferred by decedent over the property received in exchange under the limitation provisions of Sec. 811(i) of the Code?

The Tax Court held no sale occurred and there was not consideration as contemplated by the statute. It, however, held there existed an exchange of property interests, and Sec. 811(i) limits the inclusion in gross estate under Sec. 811(c) to the excess of the value of the interest transferred over the value of the interest received, if a *bona fide* sale did not exist but an exchange occurred.

8. Whether petitioner overpaid the estate tax?

This question is raised by the erroneous inclusion in the gross estate of decedent of property not owned by him at the time of his death. The case should be remanded for determination of the amount of overpayment.

Specification of Errors Relied Upon.

1. The Tax Court erred in holding that the decedent and his surviving spouse held their property as community property prior to the agreement of December 2, 1942. Said holding is contrary to the evidence, which establishes that the property was held in joint tenancy with rights of survivorship, and the respondent so determined in his notice of deficiency.

2. The Court erred in holding and deciding that interests in property were transferred by the decedent to his wife by the agreement of December 2, 1942. The agreement did not cause a transfer of the one-half of the property owned by each. Each party owned precisely the same property after the agreement as before. The change in legal title occurred irrespective of conveyances, and is recognized for federal tax purposes.

3. The Tax Court erred in failing to hold that Sec. 811(c) of the Code did not apply to a division of community-held property between spouses. Sec. 811(d)(5) plainly provides that it is applicable only to gifts by both spouses to a third party or parties. The respondent invalidly attempted by his regulations to extend the statute to such a division.

4. The Tax Court erred in failing to hold and decide that the transfer by decedent to his wife of his interest in property held in joint tenancy with her was not within the purview of the statute. An estate in joint tenancy cannot be devised by a joint tenant. It vests in the survivor at death of the joint tenant. A transfer of a share of the joint estate by a co-tenant could not be a substitute for a testamentary disposition—hence not within the purview of the statute.

5. The Tax Court erred in holding and deciding that the primary and dominant motive of the decedent in making the agreement of December 2, 1942, was to escape estate taxes. The holding is contrary to the evidence which establishes that the primary motive of the decedent, if any, was to divide the ownership of their property as the parties had always understood and intended their property ownership to be, and to assure a division of income for income tax purposes and to avoid a possible gift tax which decedent had been advised would be imposed if the division was made after January 1, 1943. The evidence establishes that decedent acted without original motive. He acted entirely upon the advice and insistent urging of counsel, who advised him that execution of the agreement would not be subject to estate tax; therefore, decedent could not possibly have had an intent to avoid estate tax.

6. The Tax Court erred in holding and deciding that a primary and dominant purpose to escape estate taxes was alone sufficient to constitute the agreement of December 2, 1942, a transfer of interests in property made by decedent in contemplation of, or intended to take effect in possession or enjoyment at or after, his death within the meaning of Sec. 811(c) of the Internal Revenue Code. This is an error of law. The Supreme Court, the Circuit Court of Appeals for the Third Circuit, and The Tax Court itself in a later decision, all have held specifically that such a motive alone is not sufficient to bring a transfer within the statute.

7A The Tax Court erred in holding and deciding that the agreement of December 2, 1942, between decedent and his wife did not constitute a bona fide sale for an adequate

and full consideration in money or money's worth within the exception provided in Sec. 811(c) of the Internal Revenue Code. This is an erroneous conclusion of law in that, under the law, any transmutation of community property between spouses is an exchange of like properties for like properties, which constitutes adequate and full consideration in money or money's worth, and, by the nature of the exchange, a bona fide sale exists.

7B. The Tax Court erred in failing to hold and decide that if a transfer occurred by the agreement of December 2, 1942, there resulted an exchange of property of equal value so that there was no excess of the fair market value at the time of the death of the property otherwise to be included on account of such transaction over the value of the consideration received therefor by the decedent as provided in Sec. 811(i) of the Internal Revenue Code.

8. The Tax Court erred in failing to hold and decide that petitioner overpaid the estate tax. A decision favorable to the petitioner would result in an overpayment of estate tax by virtue of the erroneous inclusion in the return filed for the estate of property not belonging to decedent at the time of his death, and, also, by virtue of additional court costs and attorneys' fees incurred by petitioner in the prosecution of this appeal. A decision favorable to the petitioner would require the remanding of the case for the purpose of ascertaining the amount of the overpayment.

Summary of Argument.

The argument of petitioner may be summarized as follows:

1. The respondent in his deficiency notice found that the property of the decedent and his surviving spouse was owned by them in joint tenancy prior to December 2, 1942, and that after that date, pursuant to an agreement dividing the property between the parties, they held their properties in tenancy in common, and that the value of the property transferred by the decedent was includible in the gross estate under Sec. 811(c) and (d)(5) of the Internal Revenue Code. Sec. 811(d)(5) pertains solely to transfers of property held as community property. The Tax Court held that the property of the decedent and his surviving spouse were held as community property prior to December 2, 1942. Petitioner accommodated her proof to the determination contained in the deficiency notice that the property was owned in joint tenancy, and the evidence submitted on behalf of the respondent, and admissions made at the trial by respondent, support petitioner's contention on this point. The Tax Court erred in holding that the property was held as community property. The respondent did not properly raise the question of community ownership, having failed to amend his answer or apprise the petitioner prior to the hearing that such was his contention, which was contrary to his determination. The Tax Court should have passed the point.

2. A transfer of interest in property was not accomplished, the agreement of December 2, 1942, dividing the

property held by decedent and his surviving spouse whether in joint tenancy or as community property. Such a change in ownership could occur upon oral agreement. There merely is a declaration of change in ownership, and no possible transfer of interests in property could occur, since each party owned the identical interests in property before the agreement as after. Hence the requirements of the statute, that a transfer of interests in property must have occurred, has not been met, and Sec. 811(c) of the Internal Revenue Code is not applicable in the premises.

3. Sec. 811(c) was not made applicable to a division of community property between spouses by Sec. 811(d)(5) of the Code. The plain wording of that section makes it applicable only to gifts by the spouses to a third party or parties. The respondent's regulations attempt to extend the section to be applicable to a division of property between spouses. It is beyond the scope of the statute, and, therefore, invalid.

4. A transfer of a share of an estate held in joint tenancy could not constitute a transfer of interest in property made in contemplation of, or intended to take effect in possession or enjoyment at or after, the death of a decedent because such a share of a joint estate, by the very essence of the estate, could not be disposed of by will and hence could not be a substitute for a testamentary disposition. The crux of the application of Sec. 811(c) to transfers of interests in property is that the interest so transferred is subject to testamentary disposition since upon the death of the co-tenant the survivor, by operation of law, receives the full estate. The statute does not apply.

5. The evidence does not support the finding and holding by The Tax Court that the primary and dominant motive of the decedent in making the agreement of December 2, 1942, was for the purpose of escaping estate taxes. The evidence proves beyond question that the decedent acted entirely at the insistence of and upon the advice of counsel to such an extent that there was a want of a motive. The evidence is clear that decedent thought he and his wife owned their property in separate estates, share and share alike, and that holding their property in joint tenancy accomplished this result. Their intention had been to so hold their property, and when decedent became apprised of the fact that a joint tenancy did not mean separate ownership, he executed the agreement of December 2, 1942, to divide his property to accomplish this purpose. The agreement was made entirely upon advice of counsel that such would not be within the federal estate tax laws and that it would serve to assure a division of income which decedent was interested in preserving for income tax purposes, since he contemplated retirement from business on July 1, 1943, and was apprehensive that the federal income tax laws would be changed to eliminate the division of income enjoyed by community property states. Finally the agreement was entered into upon advice of counsel that it should be done prior to January 1, 1943, in order to escape a federal gift tax which would become effective on that date upon a division of community-held property.

The evidence proves that it was a physical impossibility for the decedent to have had any motive to escape estate tax, let alone a primary and dominant motive. Counsel, advising decedent to make the agreement, assured him that

no estate taxes would be affected by the agreement if made prior to January 1, 1943. In this regard respondent's regulations extending the statute to include transfers between spouses of community property were not promulgated until March 10, 1943, so that as far as decedent knew or could have intended, he did not make the agreement on December 2, 1942, for the purpose of escaping estate taxes.

6. The Tax Court committed an error of law by holding that a primary and dominant motive to escape estate taxes alone is sufficient to bring a transfer of interest in property by the decedent within the purview of Sec. 811(c) of the Internal Revenue Code. The case of *Denniston v. Commissioner* (C. C. A. 3, 1939), 106 F. 2d 925, held on that precise point that such a motive, standing alone, is not sufficient to bring a transfer within the purview of the statute. In the case of *Allen v. Trust Company of Georgia* (1946), 326 U. S. 630, the Supreme Court refused to hold that such a motive was sufficient to bring the transfer within the statute. In the case of *Estate of Charles J. Rosebault*, 12 T. C.—No. 1, decided by The Tax Court on January 5, 1949, it was specifically held that such a motive will not alone cause the transfer to be in contemplation of death.

None of the cases relied upon by The Tax Court supports its holding. There were other factors and elements present in each of the cases relied upon which justified those decisions.

The holding of The Tax Court is in direct conflict with the *Denniston* case and the doctrine of the *Trust Company of Georgia* case and its own latest decision on the point.

7A. If a transfer occurred by the agreement of December 2, 1942, then a bona fide sale for an adequate and full consideration in money or money's worth took place within the meaning of the exception provided in Sec. 811(c) of the Internal Revenue Code, and The Tax Court erred in including in the gross estate of the decedent said property. There is authority for the proposition that a bona fide sale occurred by the exchange of properties between decedent and his surviving spouse. All other factors necessary to bring the transaction within the exception provided in the statute are present. That there was adequate and full consideration is so patent that it needs no argument. The Commissioner found that the value of the transferred interest in property was \$124,560.94, and under The Tax Court's theory of the case the decedent received the same value of property, so it is inconceivable that any holding could ever be made such as The Tax Court did, that \$124,560.94 exchanged for \$124,560.94 did not constitute adequate and full consideration for the transfer. Further, The Tax Court's theory that decedent's wife was exchanging her marital rights in the community-held property is utterly absurd and without foundation and is in direct conflict with the holding in the case of *United States v. Goodyear* (C. C. A. 9, 1938), 99 F. 2d 523 and *United States v. Malcolm* (1931), 282 U. S. 792, and *Commissioner v. Harmon* (1944), 323 U. S. 760, wherein it was held that the wife had full ownership of her half of the community-held property.

7B. If the agreement of December 2, 1942, constituted a transfer of interest in property by the decedent and such was not a bona fide sale for an adequate and full consideration in money or money's worth, then petitioner re-

ported at least the value of the interest in all property owned by decedent at the time of his death because such value did not exceed the value of the interest transferred by him for the consideration of the property owned by his wife. Sec. 811(i) is a limiting section of the Code upon transfers occurring under Sec. 811(c), and the factor of contemplation of death becomes, as a result, of no importance in the determination of the value to be included in the gross estate. In fact, Sec. 811(i) presumes that there was a transfer made in contemplation of death; yet it specifically provides that if the transfer was made for consideration only the excess of the value of the property transferred by the decedent at the date of his death over the value of the property received as consideration in the transaction is includible in the gross estate. Here again an exchange of property of the value of \$124,560.94 for property of the value of \$124,560.94 certainly is consideration, and there is no excess to be included in the gross estate of the decedent.

8. Petitioner overpaid the estate tax on behalf of the Estate by erroneously including in the gross estate of the decedent the full value of the shares of stock of the Home Builders' Loan Association of Pomona, California, United States Treasury bonds, and two automobiles and the joint-held bank account. This error, coupled with additional expenses incurred in the prosecution of this appeal for attorneys' fees, court costs, and costs of appeal, requires that the case be remanded to The Tax Court with instructions to enter a decision of the amount of the overpayment of estate tax made.

ARGUMENT.

POINT I.

The Property of the Decedent and His Wife Prior to the Execution of the Agreement of December 2, 1942, Was Held in Joint Tenancy With Rights of Survivorship, and Not in Community.

A. Ownership in Joint Tenancy Is Proved by the Evidence.

The evidence clearly establishes that the property of the decedent and his wife was held in joint tenancy at the time they executed the agreement of December 2, 1942. It was agreed at the hearing that the deeds to the four parcels of real property [R. 66, 67] were in joint tenancy in the names of the decedent and his wife with rights of survivorship. It was further agreed at the hearing that the certificate of ownership of the 1675 shares of common stock of the J. C. Penney Co. [R. 67] involved in the proceeding stood in the individual name of Edwin W. Rickenberg. The testimony of Mr. A. L. Hickson, the attorney for Mr. Rickenberg, establishes that the 40 shares of capital stock of the Home Builders' Loan Association of Pomona, California, also stood in the individual name of the decedent [R. 163, 164]. The testimony of Mrs. Rickenberg establishes without contradiction that all the certificates of stock, the government bonds, and certificates of title to the two automobiles were kept in a safety deposit box owned in the joint names of the decedent and his wife [R. 142].

The evidence also establishes without contradiction that the banking account in the amount of \$23,980.66 was a joint banking account of decedent and wife [R. 142].

The recitations of the agreement itself do not negate the fact that the decedent and his wife owned their prop-

erty in joint tenancy prior to December 2, 1942. There is adequate explanation for the paragraph of the agreement which reads:

“Whereas they have accumulated and acquired certain property since their said marriage, all of which property has been and is up to this time community property, * * *.”

This paragraph was placed in the agreement as the result of the discussions which decedent had with one Walter W. Jones relative to his retirement from business. Although resident of a community property state for nearly all his life, decedent took title to his real properties in joint tenancy. When questioned by Jones as to the manner in which his property was held, he stated that he held the properties in joint tenancy. Jones did not remember the manner in which decedent said he owned his personal property.

It could have been that the personal properties were held as community property so far as Jones knew. He was advising decedent in the matter, hoping to sell insurance policies on the life of the decedent as well as on the life of his wife, and undertook to aid the decedent in straightening out the title to his properties [R. 108, 109].

After written advice relative to the tax effect was obtained by Jones from a tax counsel, one Toll, Jones suggested that the decedent execute an agreement with his wife stating that their property was community property, the title to which had been held as joint tenants and would thereafter be held by them as tenants in common, each an undivided one-half interest therein, which suggestion became incorporated in the agreement of December 2, 1942, involved herein [R. 203, 206].

The declaration in the agreement that the property was community property was thus the result of the advice of the said Jones. It does not comport with the facts which are established by the evidence that the decedent and his surviving spouse owned their property in joint tenancy. The decedent by his statements narrated by Jones supported the contention that the property was owned in joint tenancy [R. 107, 108], as did the testimony of Mrs. Rickenberg [R. 141, 142].

It is thus apparent that the actual ownership of the property by decedent and his wife prior to December 2, 1942, was in joint tenancy. The recitations of the agreement that it was owned as community property is not supported by any evidence, but is a mere statement which was incorporated in the agreement at the suggestion and advice of decedent's counsel, and hence can have no effect to establish ownership.

The respondent himself in the deficiency notice made a determination that the properties "were held by the decedent and his wife as joint tenants and that in December, 1942, the title to these properties was transferred to decedent and his wife as tenants in common." This is the part of the official determination which gave rise to the instant proceeding [R. 8, 11].

The preponderant weight of the evidence shows joint tenancy. Such method of ownership was determined by the respondent in his notice of deficiency. The Tax Court not only committed error in holding that the decedent and his surviving spouse held their property as community property prior to the agreement of December 2, 1942, but went far afield in order to arrive at such a conclusion.

- B. The Tax Court Should Have Passed the Question of Ownership of the Property of Decedent and His Surviving Spouse Prior to the Execution of the Agreement of December 2, 1942, and Accepted Respondent's Determination in His Notice of Deficiency That Said Properties "Were Owned by the Decedent and His Wife as Joint Tenants."**

In his notice of deficiency the respondent made the determination that "transfers of property of the value of \$124,560.94 are included in the gross estate under the provisions of Sec. 811(c) and 811(c)(5) of the Internal Revenue Code." The next paragraph of respondent's determination states:

"The evidence shows that the four items of real property described in Schedule A of the return, the 1675 shares of stock of J. C. Penney Co. described in Item 1 of Schedule B, and the household furniture of the total value of \$1,500.00 were owned by the decedent and his wife as joint tenants and that in December, 1942, the title to these properties was transferred to decedent and his wife as tenants in common * * *."

Thus we have an official determination by the Commission that the decedent and his surviving spouse, prior to the execution of the agreement of December 2, 1942, owned their properties as joint tenants. The respondent gives as his reason for including the value of the properties in the gross estate of the decedent that the transaction created a transfer under the provisions of Secs. 811(c) and 811(d)(5) of the Internal Revenue Code.

Without having amended his pleadings to raise the issue that the property was held as community property by decedent and his surviving spouse prior to the agreement of

December 2, 1942, and without having made any offer of amendment of the pleadings prior to the hearing before The Tax Court, the respondent at the hearing, speaking through his counsel, attempted to change his own determination that the property was owned in joint tenancy and to contend that the properties involved were owned by decedent and his surviving spouse as community property prior to the agreement. The respondent at the trial abandoned his determination that the transfers of joint-held property were includible in the gross estate under the provisions of 811(c) [R. 62].

The court's attention is respectfully directed to the fact that respondent at the hearing and in his brief filed with The Tax Court made no contention that the properties were held in joint tenancy and were, therefore, includible in the gross estate of the decedent under the provisions of Sec. 811(c).

Sec. 811(d) by its very wording refers only to properties held as community property by decedent and his surviving spouse, and it brings into play Sec. 811(c) and the transfers enumerated under Sec. 811(d) (1), (2), (3), and (4) only where there has been a transfer of property held as community property by decedent and his surviving spouse during their marital lives.

It is demonstrated by respondent's own inconsistent contention with his determination that Sec. 811(c) of the Code was not even considered by respondent to be applicable to a transfer by decedent of property held by him in the estate of joint tenancy with his surviving spouse. Respondent shifted his position at the trial and on brief to attempt to justify his determination on an entirely different ground: to-wit, that the properties were held as community properties.

That the respondent may not make a determination on one ground and then without timely amendment of his answer prior to trial where issue has been joined upon the determination change his ground for the assertion of the deficiency and raise a new issue which the taxpayer is not prepared to answer and of which he has no knowledge until confronted at the hearing, is well established as a rule of law for a protection of the fundamental rights of a taxpayer. As the Supreme Court said in *General Utilities and Operating Co. v. Helvering* (1935), 296 U. S. 200:

“Always a taxpayer is entitled to know with fair certainty the basis of the claim against him; stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised.”

Petitioner in the hearing before The Tax Court prepared her case and accommodated her evidence to the issue thus adequately raised by the above quotation from the deficiency notice, and there being no issue raised by the respondent prior to the hearing that decedent's property was held as community property, no evidence was offered by petitioner on this point, although if the notice of deficiency or an amended answer by respondent had raised the issue of community ownership, the contrary could easily have been proved.

Booth Fisheries v. Commissioner (C. C. A. 7, 1936), 84 F. 2d 49;

United Business Corp. of America, 19 B. T. A. 809;

Eric H. Heckett (1947), 8 T. C. 841;

The Maltine Co. (1945), 5 T. C. 1265;

Wentworth Mfg. Co. (1946), 6 T. C. 1201.

So in the instant case the petitioner was entitled to rely upon respondent's own determination that the property in question was held in joint tenancy prior to the agreement of December 2, 1942, and The Tax Court should have passed the point. But, in any event, the evidence which was adduced at the hearing and the stipulations of counsel as to the manner in which titles to the property were held, clearly establish that the property, prior to December 2, 1942, was by decedent and his surviving spouse in the estate of joint tenancy. This being so, and the respondent having made no argument that Sec. 811(c) was applicable to property held in joint tenancy, it must follow *a fortiori* that The Tax Court committed error in holding that the agreement of December 2, 1942, constituted a transfer of interest in property made by the decedent in contemplation of, or intended to take effect in possession or enjoyment, at or after his death within the meaning of that section.

The official determination was that the decedent owned his property in joint tenancy. Petitioner agrees that that was the fact, and raised no issue as to that determination. At the hearing respondent, through counsel, stated that his contention was that the decedent held his property as community property. Even if the law were otherwise permitting the shifting of grounds at trial, the respondent failed in his proof. (*Estate of Natalie Koussevitsky* (1945), 5 T. C. 650.) Respondent made no offer of proof of his contention that the property was held as community property. In addition to the error committed by The Tax Court in considering the new issue improperly raised, there just plain was not any evidence submitted by respondent to support the holding of The Tax Court. And, since no contention was made that a transfer of joint-held property was within the statute, the determination must be reversed.

POINT II.

No Interest in Property Was Transferred by the Decedent to His Wife by the Agreement of December 2, 1942, Within the Meaning of Sec. 811(c) of the Internal Revenue Code.

Whether the decedent and surviving spouse held their property as community property or in joint tenancy, the first inquiry is whether a transfer of any interest in property was made by the decedent by the agreement of December 2, 1942.

If there were not a transfer, obviously the statute does not apply. Thus it is said in "*Hughes, Federal Death Tax*," 1938 Ed., Sec. 88:

"What the law taxes in contemplation of death is a 'transfer'. It follows that unless there is a transfer, this phrase has no application. A renunciation of a right under a will has been held not to give rise to a transfer."

and 1 Paul "*Federal Estate and Gift Taxation*," Sec. 6.04:

"It is also implicit in the statute that the decedent must have made a transfer and a transfer must have been of property owned by the decedent."

and, also, the following statements is made in *Montgomery's "Federal Taxes—Estate Trust and Gifts 1947-48,"* page 437:

"* * * Obviously the decedent must have transferred property during his life in order for the statute to be invoked."

In the case of *Brown v. Ruotzahn* (C. C. A. 6, 1933), 63 F. 2d 914, rev. *idem.* 58 F. 2d 239, cert. den. 290 U. S. 641, 54 S. Ct. 60, a surviving husband renounced a one-

third interest in his wife's estate which she had bequeathed to him by her will. The Government sought to tax the renunciation under a section of the internal revenue laws which was a forerunner of Sec. 811(c) of the Code in question and contained the same wording in all important respects. The Circuit Court of Appeals for the Sixth Circuit, however, held that renunciation was not within the purview of the statute because the mere refusal of a decedent to take under a will was not a transfer. Similarly, the exercise or release of a power of appointment created by a third person was held not to be a taxable transfer under the analogous wording of the Gift Tax Law, Sec. 1000(a), which also required a "transfer."

Clark (1942) 47 B. T. A. 865 (acq. by Commissioner 1942—2 C. B. 4);

Grasselli (1946), 7 T. C. 257 (acq. by Commissioner 1946—2 C. B. 2).

In the majority opinion The Tax Court assumed that there were transfers of property by the decedent brought about by the agreement of December 2, 1942. There is evidence that instruments of conveyance were exchanged by the parties pursuant to said agreement. However, because of the determination of the respondent that the property was held in joint tenancy, and the agreements of counsel at the hearing, as discussed under Point I, these deeds and certificates of stock ownership were not placed in evidence. However, under the law of taxation and the property law of the State of California, these deeds and instruments of conveyance were completely superfluous and accomplished nothing in so far as any transfer of property occurred. Whether the property was held by the decedent and surviving spouse in joint tenancy or as community

property, an agreement to change the ownership thereof to that of tenancy in common effected the change without there being any actual transfer of property involved, and such agreements of change of ownership of property are valid even though oral.

Jurs v. Commissioner (C. C. A. 9, 1947), 147 F. 2d 805;

Estate of Lester L. Fletcher (1941), 44 B. T. A. 429;

Estate of Joe Crial (1942), 46 B. T. A. 658;

Samuel Friedman, et al. (1948), 10 T. C. 1145.

What, then, was the effect of the agreement of December 2, 1942? It brought about merely a rearrangement of legal incidents of property ownership from the estate of joint tenancy or community property to that of tenants in common. Each of the parties had identical ownership and enjoyment of possession of his one-half of the property under the agreement as he had before.

Under the property laws of California, property held in joint tenancy by husband and wife is owned one-half by the husband and one-half by the wife. *Siberell v. Siberell* (1932), 214 Cal. 767; *Reiss v. Reiss* (1941), 45 Cal. App. 2d 740. In fact, this division of interest of ownership has been recognized by the respondent for income tax purposes, as demonstrated by his rulings that one-half of the income arising from property held in joint tenancy by husband and wife is taxable to the husband, and the other half, to the wife.

I. T. 3754, 1945, Cum. Bul. 143 and

I. T. 3825, 1946-2, Cum. Bul. 51.

The separate ownership of one-half of the property held as community property by husband and wife by each is of course so well established that no citation of authorities need be given. It was because of this division of absolute ownership that the very sections of the statute involved in this case were enacted by Congress.

H. R. Rep. No. 2333, 1st Sess., 77th Congress, 1942-2, C. B. 489.

There is perhaps no more fundamental doctrine in the law of taxation than the doctrine that "Taxation * * * is eminently practical, * * *," as stated by the Supreme Court in *Tyler v. United States* (1930), 281 U. S. 497, 74 L. Ed. 991, and reiterated by the Supreme Court in innumerable decisions to the effect that realities in tax matters should control and the incidents of taxation depend upon the substance.

Helvering v. Hallock (1940), 309 U. S. 106, 60 S. Ct. 44, 84 L. Ed. 604, and

Gregory v. Helvering (1935), 293 U. S. 465, 55 S. Ct. 66, 79 L. Ed. 596.

In the *Hallock* case, *supra*, the Supreme Court placed the lower courts and bar upon notice that the provisions of the Estate Tax Law were to be applied practically and that the "niceties of the art of conveyancing" will not be allowed to defeat the statute. The rule, if sound, should apply both ways. The "niceties of the art of conveyancing" should not be required to invoke the statute.

In the instant case The Tax Court by its holding gives approval to a purely ephemeral transfer of property derived from the medieval concepts as to the necessity of

continuous seisin. The holding disregards entirely the actuality that no transfer of property took place in a practical or economic sense as to ownership, possession, or enjoyment. Had there been only an oral agreement, by what possible concept could a transfer of property have taken place? The same is true in the case of a written agreement. Any concepts of transfer under the circumstances of this case are indeed purely figmentary and illusory. No transfer could possibly exist in reality. This being so, the requirements of the statute have not been met, and Sec. 811(c), being predicated upon the transfer of interest in property which did not exist in this case, is not applicable, and the holding of The Tax Court that it is must be reversed.

In the case of the *Estate of Lester L. Fletcher, supra*, the Board of Tax Appeals held that a partition between husband and wife of property held in joint tenancy did not constitute a transfer.

A partition of property between parties is not a transfer in any sense of the word.

20 Cal. Jur., Partition, Sec. 66, pp. 653-654.

If The Tax Court be correct in its holding that the property of the decedent and his surviving spouse was held as community property prior to December 2, 1942, then it is all the more certain that no interest in property was transferred by the agreement by merely a change in form of ownership, transmutation, commutation, or di-

vision of legal ownership. Before the agreement was entered into, and after the agreement was entered into, each of the parties owned precisely the same undivided one-half interest in the entire property. Both Judge Hill and Judge Johnson in their dissenting opinions state that this is so. Further, Judge Johnson correctly points out in his opinion, page 42 of the record, that under California law the husband could not alienate the interest of the wife in the community without her consent, as provided by Secs. 161a, 172, and 172a of the Civil Code of California. Likewise, under the law of California the wife could not alienate the husband's interest, nor could she destroy the community state by making a transfer of her own individual interests.

Since neither party had the right under the law of California to make a transfer of his or her interest in the community property, it would follow that the agreement of December 2, 1942, could not cause or bring about in any way a transfer of an interest in property held as community property by the decedent and his surviving spouse. Since a transfer did not and could not occur, the basic premise assumed by The Tax Court does not exist, and the conclusion that a transfer of an interest in property was made by the decedent in contemplation of death is without support, and must be reversed.

POINT III.

Sec. 811(c) Was Not Made Applicable to a Division of Property Held as Community Property Between a Decedent and Surviving Spouse by Sec. 811(d) (5) of the Internal Revenue Code, but Was Only Applicable to Transfers of Community Property by Either or Both Spouses to a Third Party or Third Parties.

It is submitted that there exists a basic error underlying the determination of the respondent and the affirmation of that determination by The Tax Court. This error consists of a misinterpretation of the statutes involved and an invalid extension of the statute by the respondent in his regulations. Sec. 811(d)(5) as added to the Code by Sec. 402 of the Revenue Act of 1942 provides as follows:

“For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse * * * shall be considered to have been made by the decedent,
* * *.”

Sec. 1000(d) of the Code as added by Sec. 453 of said Act provided:

“All gifts of property held as community property
* * * shall be considered to be the gifts of the
husband. * * *”

The plain and obvious meaning of both sections is that transfers of property held as community property to third parties were to be in the case of death included in the gross estate of the first to die of the community, and in the case of gifts taxable to the husband. There is not one word in either section which indicates an intention on the part of Congress to tax to the husband divisions of com-

munity property by the husband and wife to themselves in some other form of legal ownership or to include in the estate of the first to die the entire value of the property held in community where a division of the community property had been made by the husband and wife into some other legal holding. The respondent, however, promulgated his regulations in respect of these additions to the Code on March 10, 1943, and as to estate tax provided in Regulations 105, Sec. 81.15, as amended by Treasury Decision 5239, the following:

“In the case of estates of decedents dying after October 21, 1942, a transfer to a third party or third parties of property held as community property by the decedent and spouse * * *, shall be considered in accordance with Sec. 811(d)(5), as added by Sec. 402(a) of the Revenue Act of 1942, * * * to have been made by the decedent. * * * The same statutory provisions apply in the case of a division of such community property between the decedent and spouse into separate property, and in the case of a transfer of any part of the community property into separate property of such spouse; in such cases, the value of the property which becomes the separate property of such spouse * * * shall be included in the gross estate of the decedent under Sec. 811(c) or Sec. 811(d), if the other conditions of taxability under such conditions exist.”

In respondent's regulations 108, Sec. 86.2, as amended by Treasury Decisions 5366, May 5, 1944; 5437, February 3, 1945; 5471, August 14, 1945; and 5524, July 2, 1946, there was provided in respect of gifts of community property as follows:

“(c)—During the calendar year 1943 and any calendar year thereafter any gift of property held as

community property * * * constitutes a gift of the husband for the purpose of the gift tax statute (regardless of whether under the terms of the transfer the husband alone or the wife alone is designated as the donor or whether both are so designated as donors), * * *

“The rule stated in the preceding paragraph applies alike to a transfer by way of gift of community property to a third party or third parties, to a division of such community property by the husband and wife into the separate property of each, and to a transfer by the husband and wife of any part of such community property into the separate property either of the husband or the wife or into a joint estate or tenancy by the entirety of both spouses. * * *”

The respondent thus by his regulations has extended the meaning of the sections of the statute to include divisions of community-held property between husband and wife. Such attempted extension of the provisions of the statute goes beyond the authority and power of the Commissioner to act, and therefore his regulations are invalid. Hence the partition of the property by decedent and his surviving spouse is not within the ban of the statute. *Estate of Carl Jandorf, The First National Bank of Boston, Custodian and Statutory Executor, v. Commissioner* (C. C. A. 2), 1948 P. H. par. 72, 662. There is nothing in the cases of *Beavers v. Commissioner* (C. C. A. 5, 1947), 165 F. 2d 208, cert. den. 68 S. Ct. 1018, and *Charles I. Francis* (1947), 8 T. C. 822, which directs a contrary conclusion. In both of these cases the gifts involved were made to third parties; in fact, those cases tend to bear out the contention here made and to demonstrate the fundamental error of the Commissioner, the respondent, and The Tax Court.

This conclusion is fortified by the fact that Congress did not make the gift tax amendment effective at the same time that the estate tax amendment became effective upon the enactment of the statute. A delay was provided from the date of the enactment, October 21, 1942, to January 1, 1943. The only logical explanation for this difference in time is that Congress wished to permit the citizens of the community property states to transfer their holdings into whatever form they desired without incurring any tax liability. It certainly seems logical that if Congress intended to include for tax purposes partitions or divisions of community-held property into other legal holding by the husband and wife, as the respondent has attempted to do by his regulations, it would hardly have provided for different effective dates of the two sections of the statute.

In any event, by use of the conjunctive expression "in both sections" it was the plain intent of Congress to include for tax purposes transfers of community-held property to a third party or third parties by husband and wife because, for reasons fully discussed herein, Sec. 811(i) and Sec. 1002 both limit the inclusion for tax purposes upon an exchange of properties the value to the excess of that transferred over that which was received in exchange therefor, which, obviously, in the case of divisions of community property would be zero. Therefore, Secs. 811(i) and 1002 of the Code not having been amended by Congress, any attempt on the part of the respondent to tax a division of community-held property was indeed futile.

For these reasons and the other reasons set forth in the various points discussed hereinbefore, the decision of The Tax Court should be reversed and the case remanded for a determination of the amount of the overpayment of estate tax made by petitioner.

POINT IV.

The Interest Which the Decedent Owned in the Property Held by Himself and His Surviving Spouse in Joint Tenancy Prior to the Execution of the Agreement of December 2, 1942, Could Not Be Disposed of by Him by Will, and Hence Could Not Be a Substitute for a Testamentary Disposition, and Therefore Was Not an Interest in Property of Which a Transfer Was Made by Him in Contemplation of His Death Within the Meaning of Sec. 811(c) of the Internal Revenue Code.

In deciding the key case interpreting the phrase "in contemplation of death" in a statute which was the forerunner of Sec. 811(c) of the Code, the Supreme Court, in *United States v. Wells* (1930), 283 U. S. 102, laid it down:

"* * * The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the tax * * *."

Since the key to the requirements of the statute is that the transfer itself must have been made as a substitute for a testamentary disposition, it must follow that acquisitions of interests in property by operation of law cannot result from substitutes for testamentary dispositions by a decedent, and therefore could not come within the purview of the statute.

As has been previously discussed, the very essence of an estate in joint tenancy is that upon the death of a joint

tenant the estate by operation of law vests in the survivor. Hence a joint tenant cannot dispose of his share of the estate by will. Since interests in property which cannot be disposed of by will and are transferred during life are the only interests and transfers Sec. 811(c) is concerned with, it follows that Sec. 811(c) is not applicable to a transfer of a share of a joint tenancy.

This was the essence of the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of the *Estate of Flick v. Commissioner* (C. C. A. 5, 1948), 166 F. 2d 733. In that case, under the law of the State of Florida the proceeds of insurance policies on the life of decedent conveyed by him to a trustee for the benefit of his wife and daughter were payable to the widow and daughter of the insured, the primary beneficiaries named in the trust, even though the policies were made payable to "executors, administrators, or assigns" of the insured. This being so, and the widow and daughter acquiring the property by operation of law, the Circuit Court of Appeals held that the gift of the policies in trust was not made in contemplation of death, and reversed the holding of The Tax Court to that effect. In its opinion the Circuit Court of Appeals made the following statement, which is dispositive of the instant case:

"By what process of reasoning can it be truly said that A is indulging in a substitute for a testamentary disposition when he makes an irrevocable gift to B now of that which the law would have given B in

fuller measure if A by inaction had merely allowed the gift to become complete after his death.”

So it is in the instant case if a transfer occurred of decedent's joint interest in the property on December 2, 1942, to his surviving spouse, it was merely giving his wife at that time that which the law would have given her in fuller measure if decedent by inaction had merely allowed the gift to be complete after his death. Hence the transfer could not be a substitute for a testamentary disposition, and therefore not within the purview of Sec. 811(c) of the Code.

The holding of The Tax Court in the case of *Estate of Frank K. Sullivan*, *supra*, to the contrary is obviously erroneous and directly in conflict with the principles enunciated in the *Flick* case, *supra*, although decided by The Tax Court before the *Flick* decision.

POINT V.

The Evidence Does Not Support the Holding by the Tax Court That the Dominant Motive of the Decedent in Making the Agreement of December 2, 1942, Was to Escape Estate Taxes. On the Contrary, the Evidence Shows That the Decedent, Who Was Contemplating Retirement, Acted on the Advice of Counsel to Give His Wife the Legal Title to the One-half of the Property Which She Owned, as Had Always Been Their Intention to Own the Property, and to Assure a Division of Income for Income Tax Purposes and to Avoid a Possible Gift Tax Which He Had Been Advised Would Be Effective if He Executed the Agreement After January 1, 1943.

The weight of the evidence not only fails to sustain the findings of The Tax Court that decedent made the agreement of December 2, 1942, for the sole and only purpose of escaping estate taxes, but on the contrary it establishes that decedent entered into the agreement for the purpose of creating presently separate legal estates of the property owned by himself and his surviving spouse as they had always understood and intended that the property was owned. A secondary motive was to make sure upon the retirement of decedent that there would remain a division of income, because at the time there was considerable apprehension among taxpayers in community property states that Congress would deprive them of the privilege of splitting the income by the spouses for income tax purposes. Thirdly, the decedent beyond question, and as found by the court, made the agreement prior to January 1, 1943, for the purpose of avoiding gift tax he had been advised would be imposed by the amendments to the Code.

Far from there being a dominant motive on the part of the decedent to escape estate tax, the facts more clearly tend to show that there was an utter lack of any motive of any kind on the part of the decedent for any purpose in making the change in the form of property holding, let alone the single idea of escape of estate taxes. A want of motive was held to defeat the statute in the case of *Annie T. Stinchfield*, Memo. Op. T. C., Docket No. 2807, May 10, 1945; reversed and remanded on other grounds, *Commissioner v. Estate of Stinchfield* (C. C. A. 9, 1947), 161 F. 2d 555.

In that case decedent had acted entirely upon advice of counsel, and the gifts made were held for that reason not to have been made in contemplation of death, the reasoning being that there was lack of motive to do anything in contemplation of death. The same underlying thought was, oddly enough, stated by Disney, judge, who wrote the majority opinion in the instant case for The Tax Court in the case of *Fletcher E. Awrey* (1945), 5 T. C. 222.

If ever a man acted entirely upon advice and insistence of action by his counsel, certainly the decedent in this case did. The agreement of December 2, 1942, was entirely the outcome of insistent urging of decedent's friend and insurance advisor, one Walter W. Jones [R. 107, 112, 122, 126, 129].

The decedent had decided to retire July 1, 1943, and had discussed his retirement with his friend Jones. Jones ascertained during the discussions that decedent held his property in joint tenancy with his wife. Decedent thought he and his wife owned their property separately in equal division. Jones was not sure whether decedent owned his property in joint tenancy or in community, but knew that

decedent wanted and thought they had separate ownership. Jones wished to sell two policies of insurance upon the lives of decedent and his wife. He insisted that decedent change his property holding to that of tenancy in common so as to create the separate ownership the parties wanted and thought they had.

The record shows that the discussions between decedent and Jones relative to his retirement and the nature of the property holdings of the decedent commenced in the summer of 1942 and continued through the fall until the execution of the agreement on December 2, 1942 [R. 108].

When the discussions commenced, and until October 21, 1942, when the Revenue Act of 1942 was passed, an agreement made between husband and wife declaring that their property held as community property would henceforth be held by them as tenants in common did not constitute a transfer made in contemplation of death if one of the parties died. Sec. 811(c) of the Internal Revenue Code was never invoked to include such a transfer, if one there be under such circumstances.

Jones, who was in the insurance business and kept informed to some extent of changes in the tax law relative to estates as a part of his business, understood this situation. It therefore occurred to him, as the record plainly shows, that if decedent and his wife entered into an agreement declaring that their property held by them in joint tenancy was in fact owned by them as community property and that henceforth it would be owned by them as tenants in common, such an agreement would clearly not be within the purview of the statute.

However, during the fall of 1942 Jones became apprised of the fact that Congress was contemplating passing the

Revenue Act of 1942 and amending the Code relative to the estate and gift tax provisions to encompass community-held property [R. 104, 127, 212 and 213]. But, as he testified, his service was slow in reaching him. He did know that the Revenue Act of 1942 had been passed, but was not informed as to its effective date. On November 11, 1942, Jones wrote to his tax counsel, one Toll, in Los Angeles outlining the plan of the agreement which he proposed that the Rickenbergs execute, and inquired as to the legal effect of his proposal in view of the changes made to the Internal Revenue Code by the Revenue Act of October 21, 1942. Jones received a reply to his letter from said Toll stating in part:

“The division of community property between husband and wife, thus destroying its community character, seems to me a very desirable step in view of the estate tax changes affecting community property which will take place on January 1, 1943.”

Jones' letter to Toll was dated November 11, 1942 [R. 212, 213] and Toll's letter to Jones was dated November 13, 1942 [R. 213, 215]. Toll's letter went on further to advise Jones that:

“Furthermore, as to new community property, it seems quite clear to me that no gift tax is involved upon a division thereof which takes place prior to January 1, 1943, although possibly any division which takes place after that date will be subject to gift tax.”

Acting upon this advice, that no estate tax would be due by decedent until after January 1, 1943, if a division of his community-held property with his wife was effected prior to January 1, 1943, and, further, that a gift tax would be imposed if the agreement as contemplated was

entered into after January 1, 1943, Jones prevailed upon decedent to execute the agreement prior to January 1, 1943, and wrote him a letter on November 28, 1942, suggesting that this be done [R. 208, 209]. Jones then accompanied decedent to decedent's attorney, one A. L. Hickson of Pomona, California, and told Attorney Hickson the type of agreement that was desired and the purposes for which it was being done.

What we are seeking to determine in this inquiry is the state of mind of the decedent on December 2, 1942, when he executed the agreement in question. The Tax Court holds that the dominant motive causing him to execute the agreement was to avoid estate tax because he held his property as community property, all of which would be included in his gross estate at his death.

Decedent, as The Tax Court found, "was following the advice of Jones, the insurance agent," and had been informed by Jones that if the agreement in question were executed before January 1, 1943, no tax liability would occur either as to estate taxes or as to gift taxes. This was the advice of Jones' tax counsel Toll. It follows *a fortiori* that decedent could not possibly have intended to escape estate taxes even if there is attributed to him every intent and cerebration of Jones.

Jones did not think that the agreement would cause an avoidance of estate tax if the decedent owned his property as community property. The court found that he did so own it. There was no estate tax to be avoided on December 2, 1942, so far as Jones knew. He had been erroneously informed by his tax counsel that the changes in the estate tax law would not become effective until January 1, 1943.

This explains why Jones on the witness stand so steadfastly adhered to his testimony that the agreement was not made to avoid estate tax, but to avoid gift tax.

Where no tax is imposed upon a transfer of property by a decedent under the law, and the law is changed to tax such a transfer, and decedent is prevailed upon to make such a transfer upon the erroneous advice of counsel that the change in the law will not become effective until a future time, by what process of reasoning can it be held that decedent made the transfer to avoid present existing tax? The answer is obvious. He did not.

The holding of The Tax Court has been clearly demonstrated to be without any evidence to support it, let alone substantial evidence. The holding is nothing but an inference, and as such cannot support the second inference that a transfer was made by the decedent in contemplation of death. *Estate of Cronin v. Commissioner* (C. C. A. 6, 1947), 164 F. 2d 561.

Even though the purported transfers in question occurred after the effective date of the amendments to the Code, October 21, 1942, yet because of the fact that decedent acted without knowledge that the law had been changed and was in effect on December 2, 1942, and could not possibly have had an intent to escape estate taxes, the situation is analogous to the early decisions of the Supreme Court, which refused to apply the estate and gift tax statutes retroactively. In the case of *Shwab v. Doyle* (1922), 258 U. S. 529, 66 L. Ed. 747, the court refused to apply the provisions of the first Estate Tax Act of 1916 retroactively to include a transfer of property determined by the trial court to have been made in contemplation of death. The Gift Tax Act of 1924 was likewise decided by the Supreme Court in *Untermeyer v. Anderson*

(1928), 276 U. S. 440, 72 L. Ed. 645, not to be applicable to gifts made prior to its passage. Likewise, in *Nichols v. Coolidge* (1927), 274 U. S. 531, 71 L. Ed. 1181, the retroactive provisions of the Revenue Act of 1918 were held not to be applicable to include in the gross estate a gift *inter vivos* not made in contemplation of death, but long before the adoption of legislation imposing an estate tax on gifts *inter vivos* to take effect in possession or enjoyment at or after death because the tax burden could not have been foreseen or understood when the gifts were made.

Indeed, it would be an odd travesty upon justice to allow taxing acts to impose taxes retroactively upon transactions which took place many years before the enactment of legislation upon the subject. This thought is best expressed by the Supreme Court's own statement in the case of *Milliken et al. v. United States* (1931), 283 U. S. 15, 51 S. Ct. 324, 75 L. Ed. 809, 51 "Supreme Court Reporter" 324, where it said at page 326 thereof:

"This court has held the taxation of gifts made, and completely vested beyond recall, before the passage of any statute taxing them, to be so palpably arbitrary and unreasonable as to infringe the due process clause."

In the *Milliken* case the gift, when made, was subject to the 1916 Revenue Act. The court said that the decedent was warned that his gift might be taxed as it would be if he on that day made the same disposition of it by will. In the instant case, as previously pointed out, had the gifts in question been made by the decedent at any time prior to October 21, 1942, the date of the enactment of the Revenue Act of 1942, the gift would not have been taxable under any provision of any act. That was the very reason why the act was passed.

Not only does the testimony of decedent's friend, Walter W. Jones, establish that the decedent executed the agreement in question without intent to evade estate taxes, but respondent's own evidence introduced at the hearing in the form of correspondence between the said Jones and his tax counsel, Toll, particularly Toll's letter of November 13, 1942, conclusively proves beyond the shadow of a doubt that the decedent could not possibly have had an intent to avoid estate taxes. It therefore follows that respondent's determination was erroneous and that the holding of The Tax Court affirming respondent's determination, being predicated upon the sole narrow ground that decedent executed the agreement in question with the intent to avoid estate taxes, which is refuted by respondent's own evidence and is without a scintilla of evidence to support it, is erroneous.

Petitioner has proved that the motive upon which The Tax Court predicated its decision just did not exist. Having done so, petitioner can well rest her case.

Perhaps, however, a discussion of the evidence showing why decedent executed the agreement may help to clarify the issue.

A. Decedent and His Surviving Spouse Made the Agreement of December 2, 1942, to Separate Ownership of Half of Their Property in Each as They Had Always Intended to Own the Property.

Jones testified that decedent told him that he and his wife owned their property in joint tenancy; "that we both own fifty-fifty"; "we have made everything we made together"; "we own it together; it is share and share alike." [R. 108.]

When Jones informed him that if he owned it in joint tenancy the Federal Government would include it all in his estate upon his death, he said: "That isn't the way our property is." [R. 108.]

The testimony of Mrs. Rickenberg shows the intention of the spouses to own their property separately [R. 139, 140]. Corroboration is furnished by the testimony of Attorney Hickson [R. 161, 162]. The purposes expressed in the agreement itself fully establish their earlier intention of amnesty [R. 204].

The evidence thus establishes that one of the purposes of the agreement was to create the legal separate estates for the decedent and his wife of equal shares of their property, as had been their understanding and intention to own their property throughout the marital period, and which they had mistakenly thought they had accomplished by holding their property in joint tenancy. The impelling cause of the agreement was to correct an error that had been made by them, and in no way was the thought of death the impelling cause.

City Bank Farmers Trust Company v. McGowan
(1945), 323 U. S. 594, 65 S. Ct. 496, 89 L. Ed.
483.

The decedent, as found by The Tax Court, was in normal health and was obviously contemplating the enjoyment of the fruits of his property acquisitions upon his retirement from the J. C. Penney Co., and every bit of evidence in the record demonstrates that his action was dominated by motives associated with life.

B. A Second Equally Important Reason for the Agreement, as Is Fully Established by the Evidence, Is That the Decedent Wished to Make Certain That He and His Wife Would Continue to Enjoy the Benefits of the Division of Income for Federal Tax Purposes Which the Community Property States Enjoyed.

The testimony of Mr. Jones and Attorney Hickson enumerates that as one of the reasons for the agreement. The testimony was to the effect that at the period of time at which this agreement was made there had existed some well-founded apprehension among the citizens of the community property states, and especially in California, that the federal income tax laws might be amended to eliminate the advantage of the division of income for tax purposes enjoyed by those citizens. The enactment of the sections of the Revenue Act of 1942 that have brought about this litigation gives ample justification for the fears. This was one of the arguments used by Mr. Jones in convincing the decedent that he should execute the agreement. The evidence is clear and uncontroverted on this point, and it establishes that it was one of the impelling motives causing the decedent to execute the agreement.

There is ample authority that a motive to escape income taxes is one which takes an agreement out of the ban of the statute.

Estate of Julius Bloch-Zulzberger, Memo. Op., T. C. Docket No. 10216, Nov. 12, 1947, C. C. H. Decision 16129(M);

Estate of L. Bendet, Memo. Op., T. C., Docket No. 7188, April 25, 1946;

Becker v. St. Louis Union Trust Company (1935), 296 U. S. 48, 56 S. Ct. 78, 80 L. Ed. 35.

C. The Third Impelling Motive of the Decedent in Executing the Agreement of December 2, 1942, Was to Save Gift Taxes Which He Had Been Advised Would Be Imposed if He Executed the Agreement After January 1, 1943.

The said Walter W. Jones testified vehemently and repeatedly under heavy cross-examination by counsel for respondent that the reason for the execution of the agreement was to avoid the gift tax amendments to the Code which were to become effective on January 1, 1943. Section 451 of the Revenue Act of 1942 so provided with respect to the amendment made to Section 1000 of the Internal Revenue Code by Section 453 of the Revenue Act of 1942, adding thereto a new subsection "(d) Community Property." This new subsection provided that all gifts of property held as community property shall be considered to be the gifts of the husband, with certain provisos. The purpose and intent of that amendment was to tax gifts of community property to the husband; whereas, prior to January 1, 1943, gifts of community property were taxable half to the husband and half to the wife. By the amendment it is obvious that the gift tax in the community property states was in most cases increased materially.

Decedent having been advised by said Walter W. Jones that it was to his best interests to divide the property which the parties thought was held as community property by the decedent and his surviving spouse, decedent decided to execute the agreement, declaring that henceforth his property would be held in the estate of tenants in common with his surviving spouse. The advice received by decedent from the tax counsel Toll through Walter W. Jones was to the effect that the execution of such an agreement, if made after January 1, 1943, would be subject to the new

gift tax amendments to the Code. This was sufficient to cause the decedent to act before the effective date of the amendments, and The Tax Court found that the decedent so acted to execute the agreement prior to January 1, 1943.

That saving of gift tax was the dominant thing in the mind of the decedent is thus firmly established by the evidence. This has been decided in numerous cases by The Tax Court to be sufficient reason for taking a transfer out of the ban of Section 811(c) of the Internal Revenue Code under question. See

Estate of Fletcher E. Awrey, supra;

Anna Ball Kneeland, Execx. (Will of Yale Kneeland) (1936), 34 B. T. A. 816;

Estate of John H. Scheide, Memo. Op., T. C., Docket No. 2235, December 3, 1947, where a transfer to save income tax and avoid anticipated increase in gift tax was held not in contemplation of death.

See, also:

Boyle Trust & Investment Co., Exec. (Estate of C. H. Boyle), v. United States (D. C. Tenn., January 4, 1943), 32 A. T. T. R. 1624;

M. L. Fair, Execx. (Estate of M. L. Lorch), v. United States (D. C. Pa., 1945), 59 Fed. Supp. 801;

Estate of A. F. Howell, Memo. Op., T. C., Docket No. 10840, January 28, 1943; appealed C. C. A. 3; dismissed and affirmed October 19, 1943, without written opinion; 1943 P. H. par. 61,114.

Yet in the instant case The Tax Court stated:

“The idea that the object was escape of gift tax is rendered almost absurd by the fact that if no transfer had been made no gift tax would have been incurred.”

Such a statement is, at most, trite. Obviously no gift tax would ever be incurred if a person never made a gift, but every taxpayer has a right to make a gift, and if the decision to make the gift is formulated at such a time that a gift tax would be avoided, whereas, if delayed, a gift tax would be imposed, it may well be, as it was in this case, that the motivating factor which finally caused the decedent to make the gift and was dominant in his mind, was the saving of the gift tax which would result from delay on his part.

This thought is well expressed in the *Estate of Cronin v. Commissioner, supra*, where the court said:

“Even so, it is an aspect of human nature that may not be ignored, that the fear of events that impend and seem imminent, overrides apprehension of a contingency that however certain seems remote.”

Since the decedent had been advised and urged by Jones to execute the agreement in question, and that he would possibly incur a gift tax if he did so after January 1, 1943, the decedent obviously was in fear of the imminent event of the impending gift tax rather than apprehending the certain contingency which, so far as the evidence shows, seemed remote.

This thought is agreed with by Johnson, judge, in his dissenting opinion. Judge Johnson refers to the fact that decedent's lawyer had advised him that after January 1,

1943, a transfer to his wife would be taxable. From this he concludes that the facts indicate that the transfer was made in contemplation of a change in the gift tax law as applied to community property rather than in contemplation of death. Having previously demonstrated that respondent's own evidence proves that the decedent could not have intended to avoid estate taxes because of the advice given him by the lawyer, the correctness of Judge Johnson's conclusion cannot be denied.

Finally, Judge Johnson correctly points out in his dissenting opinion that the decedent did not have to maintain his *status quo* of holding his property as community property, and that he was conscious of the tax consequences of his act and, being conscious, chose an advantageous form of tenure in making the transfer. In short, Judge Johnson follows the well-established rule of law that a taxpayer may take any legal course of action which will cause him to pay the least tax. He does not have to take the course which will cause him, or, as in this case, his estate to pay the greater tax. *United States v. Isham*, 84 U. S. (17 Wall.) 496, 21 L. Ed. 728, and *Gregory v. Helvering* (1935), 293 U. S. 465, 79 L. Ed. 596, 55 S. Ct. 266.

This rule of law is made even stronger by the fact that the decedent was not conscious of the tax consequence of his act. He was erroneously advised that there would be no tax consequences of his act as to estate tax if taken prior to January 1, 1943.

The majority opinion cites as one of the reasons why decedent could not have executed the agreement to avoid

gift taxes that Jones, prior to October 30, 1942, when he first wrote to decedent, had not learned of the change in gift tax, "so that the contention that gift tax saving was in mind is without foundation." The thought being that all the discussions during the summer and fall of 1942 could not have contemplated in any way gift tax saving. That is true. But it is equally true that their discussions could not have contemplated estate tax saving for precisely the same reasons.

At that time no estate tax would have been imposed upon the whole estate of a division of property held as community. Therefore, it was physically impossible for decedent to have contemplated saving or escaping estate taxes.

Since The Tax Court found that Jones did not have knowledge of the change in the gift tax law at that time, and since the change occurred in the same statute that changed the estate tax law to affect property held as community property, The Tax Court's own findings of fact and opinion prove that Jones and decedent did not have knowledge of the change in the estate tax law and therefore could not have acted to save or escape estate taxes. So far as they knew, there were none to escape or save, but there was a danger of having to pay a gift tax if action was delayed.

Contemplating the changes in the estate tax law which took place in the Revenue Act of 1942 and comparing them with the changes in the gift tax law contained in the same act, both affecting community property, it appears conclu-

sive that Congress contemplated the very situation which is presented in this case; that is, Congress must have been apprised of the fact that innumerable citizens in the community property states holding their property as community property would be caught by the changes made by the Act to the Revenue Code affecting the inclusion in the gross estate of the decedent of the full value of the property held as community property. To suddenly impose upon a segment of the population a tax to which in the scheme of events, it had never been subject before would be unfair; and therefore it must have been that Congress intended to allow citizens of the community property states to rearrange their community property holdings if they saw fit without incurring any tax liability. Therefore the gap was allowed between the passage of the Act on October 21, 1942, and the effective date of the gift tax provisions on divisions of community-held property on January 1, 1943. In short, Congress itself seems to have deemed that avoidance of estate tax was in no wise reprehensible, and certainly that gifts made between husband and wife in the community property states for the express purpose of avoiding estate tax would not be made in contemplation of death. There is no other logical explanation for the difference in effective dates between the two provisions of the Act.

POINT VI.

A Primary and Dominant Purpose to Escape Estate Taxes Is Not Alone Sufficient to Constitute a Transfer by a Decedent of an Interest in Property as Made in Contemplation of, or Intended to Take Effect in Possession or Enjoyment at or After, His Death Within the Meaning of Section 811(c) of the Internal Revenue Code.

Having demonstrated hereinbefore that, as a matter of law, Sec. 811(c) of the Internal Revenue Code is not applicable to the agreement by the decedent and his surviving spouse executed on December 2, 1942, here involved and that the evidence does not sustain the holding by The Tax Court, we will now proceed to prove that, assuming all factors in the case in favor of the Government, the agreement in question was not within the purview of Sec. 811(c) of the Internal Revenue Code.

We will assume the Government's position and contention that the agreement of December 2, 1942, resulted in cross-transfers of interests in property held by decedent and his wife as community property; that is, that decedent transferred to his wife his one-half interest in the property so held, and that she transferred to him her half interest in the community property. We will assume the inference to be the fact that decedent executed said agreement and made said transfer for the primary and dominant purpose of escaping estate taxes. We will prove, however, as a matter of law, that a motive to avoid or reduce estate tax is not such a consequence alone which will

cause the transfer to be in contemplation of death. The Tax Court stated in the majority opinion:

“* * * we examine only, in this respect, the question as to whether there was such motive and intent to escape estate taxes as to bring the transfer within the ban of the statute. * * * The petitioner contends, however, that there is no evidence to establish that the decedent’s dominant motive was to escape estate taxes. The question is one of fact.”

The Tax Court correctly stated that it was a question of fact as to whether the inference results that decedent intended to escape estate taxes. Although we have shown that the evidence fails to support the finding that such was the dominant motive of decedent, we are assuming for purposes of this argument that The Tax Court’s finding was correct. However, The Tax Court then inferred that because decedent’s purpose was to escape estate taxes by the agreement in question, it followed as a matter of law that the assumed transfer was made in contemplation of death within the meaning of the statute.

That a primary and dominant motive to escape estate tax is not alone sufficient to bring a gift within the meaning of the expression “made in contemplation of death” as used in the statute, has been established by the Supreme Court itself. In the case of *Allen v. Trust Company of Georgia* (1946), 326 U. S. 630, 90 L. Ed. 367, the Government contended, as it does in this case, that the gift was made for the sole and only purpose of avoiding estate taxes. The District Court found that the gift was not made in contemplation of death. The Circuit Court of Appeals for the Fifth Circuit affirmed. The Government sought and was granted certiorari. The sole argument

made and contention presented by the Government was that the transfer consisting of the release of the power of amendment was made for the purpose of avoiding estate tax and, therefore, was made in contemplation of death. The Supreme Court refused to disturb the holdings of the lower court even though the release of the power which constituted the gift was done for no other purpose than to eliminate from his gross estate the trust which the donor had created prior and in which the power of amendment had been reserved by him.

Under the federal estate tax law then in effect, had the decedent Spalding not released the power of amendment prior to his death, the trust created by him for the benefit of his children would have been included in his gross estate. He was a lawyer and knew and understood this to be the law, and had been so advised by other lawyers. He could have had no other dominant motive in mind in making the release of the power to amend the trust except to avoid the estate taxes thereon.

The net result of the decision is that an intent to escape tax is not, *per se*, contemplation of death within the meaning of Sec. 811(c) of the Internal Revenue Code. There must be other facts found which, when weighed with a motive to escape estate tax, constitute "contemplation of death."

Once before The Tax Court tried to invoke the doctrine that avoidance of estate tax is, *per se*, contemplation of death within the meaning of the statute where an *inter vivos* transfer of property had been made by decedent. When it was the Board of Tax Appeals, it decided the case of the *Estate of Denniston* (1939), 38 B. T. A. 1076; reversed *Denniston, Exec., et al., v. Commissioner* (C. C.

A. 3, 1939), 106 F. 2d 925. In that case the subject matter of the gifts was a relinquishment in 1932 of a power of appointment retained by the decedent Denniston in a trust she had made in 1915 in favor of her children and outright gifts of two pieces of real property conveyed by deeds to her daughter. As in the instant case, the decedent Denniston was in good health, as found by the Board, although much older, 74 years of age at the date of the gifts. She also had been advised by her attorneys that the corpus of the trust would be included in her gross estate for federal estate tax purposes if she did not relinquish the power of appointment, and that a gift tax was being contemplated by Congress, and was passed in that year, which would have imposed a tax upon the gifts if she delayed in making the gifts until after the law was enacted and became effective. These facts parallel the facts in the instant case.

The Board of Tax Appeals, just as in the instant case, predicated its holding solely on the ground that the decedent Denniston sought to avoid estate taxes, and therefore affirmed the determination of the Commissioner that the gifts were made in contemplation of death within the meaning of the statute.

On the appeal in the case of *Denniston, Executor, et al. v. Commissioner, supra*, the Circuit Court of Appeals for the Third Circuit viewed the matter differently, and said:

“There was as the Board points out, substantial evidence to support the finding that the decedent was motivated by the desire to avoid estate taxes and we

must accept it. * * * The question remains, however, whether the fact that a transfer was made to avoid estate tax is, without any other evidence of a motive associated with death, sufficient to support an ultimate finding or conclusion that the transfer was made 'in contemplation of death' within the meaning of Sec. 302 of the Revenue Act."

The court then answered the question in the following language:

"We think that because in carrying out a plan to provide for her children the donor uses a method which she thinks is best calculated to save death taxes the conveyance is not thereby conclusively stamped as 'contemplation of death.' The desire to avoid estate taxes may be just as clearly present in the mind of a young and vigorous donor who thinks of death as far distant as in that of one who is old and feeble and who looks momentarily for its coming. Standing alone, it cannot be deemed conclusive of a mental state such as is contemplated by the statutory phrase 'contemplation of death.'"

The Tax Court has deliberately ignored or failed to understand the doctrines laid down by the Supreme Court that a single factor cannot constitute a gift *inter vivos* as made "in contemplation of death" within the meaning of that phrase as used in Sec. 811(c) of the Internal Revenue Code. *Colorado National Bank v. Commissioner* (1938), 305 U. S. 23, 27.

The holding in *Commonwealth Trust Company of Pittsburgh v. Driscoll* (1943), 137 F. 2d 653, cert. den. (1944) 321 U. S. 764, relied on primarily by The Tax Court, is

not in conflict with the *Denniston* and *Trust Company of Georgia* cases. There were other factors involved which justified the *per curiam* affirmance of the District Court decision. It is not authority for the proposition that a motive to escape estate tax is alone sufficient to constitute a transfer as made in contemplation of death.

In that case the decedent was 80½ years of age on the date of transfers. The circumstances surrounding the transfers showed thoughts of death. But the thing which made the District Court's decision correct, completely, aside from contemplation of death, was the fact that the transfers were to take effect in enjoyment and possession at or after the donor's death. He still retained possession and enjoyment of the property until five years after the gift. It was his death which brought about the completed gift. There thus existed no reason for the Circuit Court of Appeals to reverse the District Court, so it merely affirmed the judgment without opinion.

Further, it must be carefully borne in mind that the same Circuit Court of Appeals affirmed the *Commonwealth Trust Company of Pittsburgh* decision that decided the *Estate of Denniston v. Commissioner* case, *supra*. Nor is it of any significance that the Supreme Court denied certiorari. Correctness of the decision was sufficient reason.

In the same way the other three cases cited as authority by the majority opinion are easily distinguishable. They all involved gifts of property to take effect in possession or enjoyment at or after the death of the donor.

Thus for any reason it was includible in the gross estate of the donor upon his death. In all the cases there were additional factors which, in addition to establishing contemplation of death, required the inclusion of the property in the gross estate. *Commissioner v. Estate of Church* (January 17, 1949), 1949 P. H. par. 72,004.

It therefore follows that The Tax Court has failed to follow the applicable decisions of the Supreme Court and the Circuit Courts of Appeals in deciding the instant case. The decision of The Tax Court must be reversed.

And now, finally, The Tax Court has completely demonstrated its lack of coordination and its utter inconsistency in its decisions. On January 5, 1949, an opinion was promulgated in the case of the *Estate of Charles J. Rosebault, Laura D. Rosebault, Executrix* (January 5, 1949), 12 T. C. No. 1, wherein The Tax Court arrived at an exactly opposite decision from its decision in the instant case.

It is significant that not one of the members of The Tax Court constituting the majority in the opinion in the instant case even raised his voice in protest against Judge Hill's opinion in the *Rosebault* case. Judge Hill had the courage of his convictions to dissent from the majority opinion in the instant case, and on the very same ground upon which he predicated his opinion in the *Rosebault* case. The net result is that we have The Tax Court within a year's time deciding the precise point oppositely. Their last decision was in accordance with the decided cases of the *Estate of Denniston v. Commissioner, supra*, and *Allen v. Trust Company of Georgia, supra*; whereas, their decision in the instant case is, as before stated, in direct conflict with these decisions.

POINT VII.

If Under the Agreement of December 2, 1942, Decedent Transferred His Interest in the Property Owned by Him Prior Thereto, Then:

- A. A Bona Fide Sale for an Adequate and Full Consideration in Money or Money's Worth Took Place Within the Meaning of the Exception Provided in Sec. 811(c) of the Internal Revenue Code, and Petitioner Reported at Least the Value of Decedent's Interest in Property at the Time of His Death; or:
- B. If Said Transfer was not a Bona Fide Sale for an Adequate and Full Consideration in Money or Money's Worth, Then There Did Not Exist Any Excess of the Fair Market Value at the Time of Decedent's Death of the Property Transferred by Him on Account of Such Transaction Over the Value of the Consideration Received Therefor by the Decedent as Provided Under Sec. 811(i) of the Internal Revenue Code.
- A. The Transaction Was a Bona Fide Sale for an Adequate and Full Consideration in Money or Money's Worth.

Petitioner has strongly contended that if transfers of property be deemed to have occurred by the agreement of December 2, 1942, as assumed by the respondent in his determination and further assumed by The Tax Court in its decision in the instant case, the transaction falls within the exception provided in Sec. 811(c) as a *bona fide* sale for a full and adequate consideration in money or money's worth. The essence of the consideration obviously is the receipt of money or of property which is readily reducible to money or money's worth.

The majority opinion below holds that the agreement does not come within the exception provided in Sec. 811(c) for three reasons:

First, no sale.

Second, under Sec. 812(b)(5) of the Internal Revenue Code, relinquishment of marital rights in the decedent's property shall not be considered to any extent a consideration in money or money's worth.

Third, that there was a lack of consideration because the exchange of property did not bring into decedent's estate the equivalent therefor.

The absurdity of the majority opinion in the second holding above referred to is so patent as to hardly merit passing observance. As pointed out in the dissenting opinion of Judge Hill, the majority completely misunderstood that the surviving spouse was not relinquishing marital rights in decedent's property in exchange for his transfer to her of his half of the community property. Petitioner does not now and never has contended that the surviving spouse had any marital rights in the property of the decedent or that, if such existed, she did in any way transfer them to decedent by the agreement of December 2, 1942. It is fundamental, of course, that the wife owns absolutely one-half of the community-held property. The minority opinion of Judge Hill very nicely sets forth the property rights and interests of the community relationship, and points out the error in the holding of The Tax Court in this regard, and needs merit no further comment.

As to the third reason for their holding in this issue, that there was no consideration because the estate of the

decedent was not left intact by that which it received in exchange for that which was transferred, is so absurd as to be utterly ridiculous. The majority opinion went off on a tangent after stating:

“In short, the intent of the exception stated in section 811(c) is that if the transfer of property from a decedent brought into his estate the equivalent thereof, the estate, of course, was not diminished. * * * The petitioner’s estate here, had there been no transfer of December 2, 1942, would have included the community property. It would have included the property even though it was regarded as joint estate. After that transfer, decedent’s estate, except for the application of Sec. 811(c) consisted of one-half of the property transferred. The diminution of the estate, and the lack of the necessary consideration in money or money’s worth cannot be doubted.”

The error in The Tax Court’s reasoning is patent. First it assumes that the decedent owned all the property prior to December 2, 1942, although it had held that the property was held as community property. It could not be both. If held as community property, the decedent only owned one-half of the property. Even if held jointly, he only owned one-half of the property. There never was, by any theory, a diminution of his estate. The Government’s theory of the case, which the majority opinion of The Tax Court, in the above-quoted language, has completely lost sight of, is that the decedent and his wife owned their property in community, that he owned one-half of the property, and that she owned one-half of the property, that the transfer by him on December 2, 1942,

was for tax purposes of no effect, and that, therefore, the half of the property which he received from her and held as tenant in common at the date of his death, plus the half of the property which he transferred to her on December 2, 1942, which transfer was ineffectual for estate tax purposes, was the measure of his gross estate, and that he was, therefore, taxable on the whole. The Government's theory is no such thing as set forth by the majority opinion of The Tax Court, although the ultimate effect in dollars and cents in tax results. The error in reasoning vitiates The Tax Court's holding that there was not adequate and full consideration in money or money's worth in the exchange. It is so obvious that the exchange of properties of like value is adequate and full consideration in money or money's worth that the holding of The Tax Court that there was not adequate and full consideration in money or money's worth is amazing in a body that has dealt with tax cases for as long a period of time as that administrative agency has. It has been agreed that the value of the property transferred was \$124,560.94. The value of the property received had to be \$124,560.94, since it was a division of community property. If \$124,560.94 exchanged for \$124,560.94 is not adequate and full consideration in money or money's worth, then words have no meaning.

As to the majority opinion's first holding on this issue, that there was no sale, it likewise is error. There is authority that a transmutation of property such as occurred here constitutes a sale. *Ferguson v. Dickson* (C. C. A. 3, 1924), 300 F. 2d 961, cert. den. 266 U. S. 628. *Black's Law Dictionary* in its definition of a sale, points out that the distinction between a sale and an exchange of property is one rather of shadow than of sub-

stance. Also, in *Sec. 93*, "*Hughes Federal Death Tax*," it is stated:

"The word 'sale' as used in this section of the law should not receive too strict a construction and must be considered to embrace an exchange."

All the legal elements necessary to constitute a sale clearly exist in this case.

Since the decision below, The Tax Court has decided the question of consideration exactly opposite in a gift tax case. The case of *Norman Taurog* (1948), 11 T. C. No. 120, involved a division of community property in California between a husband and wife who were contemplating divorce, and which division was to be imposed in the divorce decree and also, in fact, made a part of such decree. This was done at a time when the provisions of *Sec. 453* of the Revenue Act of 1942 were in effect, which amended *Sec. 1000* of the Code by adding a new subparagraph (d) thereto, which provided that "all gifts of property held as community property under the laws of any state * * * should be considered to be the gifts of the husband * * *."

The decision of The Tax Court in the *Taurog* case was vehemently dissented to by the writer of the majority opinion in the instant case, Judge Disney. He pointed out that there is an utter inconsistency in the holding in that case and the holding in the instant case, and that the division of property in the *Taurog* case does not constitute consideration, excepting the transfer as a gift. Both the estate tax provisions of the Code and the gift tax provisions of the Code provide almost identical wording for transfers of property for less than an adequate and full consideration in money or money's worth.

Judge Disney's dissenting opinion is predicated on the doctrine announced by the Supreme Court in *Estate of Sanford v. Commissioner* (1939), 308 U. S. 39, that:

"The gift tax was supplementary to the estate tax. The two are *in pari materiae* and must be construed together."

Thus the two sections of the Code must be read together to get their meaning, and certainly if in the *Taurog* case a division of community property constituted a full and adequate consideration in money or money's worth, the division of community property in the instant case must, *a fortiori*, also constitute adequate and full consideration in money or money's worth; hence the two decisions by The Tax Court, as pointed out by Judge Disney, are totally inconsistent and in conflict with each other.

But for reasons which will be demonstrated under "B," the decision in the *Taurog* case is correct and the decision by The Tax Court in the instant case is incorrect.

B. The Transaction Was a Transfer for a Consideration in Money or Money's Worth, and the Fair Market Value of the Property Transferred at the Date of Death Did Not Exceed the Value of the Consideration Received by the Decedent.

Even if it be assumed that there were transfers of interest in property effected by the agreement of December 2, 1942, between decedent and his surviving spouse, as is the position of the Government, then there still would be no deficiency in respect of the estate tax liability. Petitioner included in the gross estate, in computing the estate tax liability of the estate of the decedent, at least the full value of the interest of one-half of the property

held in tenancy in common; in fact there was reported an excess of the value. The respondent has contended that not only must there be included the value of the half interest owned by the decedent at the date of his death, but, also, because since the agreement constituted a transfer of his interest in the community property made in contemplation of death, that that interest must also be included in the gross estate, the net effect of which, of course, is to include in the gross estate for tax purposes the entire value of all the property.

Fortunately, however, Congress put two limitations upon the application of Sec. 811(c). It is obvious that it contemplated the possibilities of the very thing which took place in this case. It provided first an exception in Sec. 811(c) that any transfer of interest made in contemplation of death would be includible in the gross estate except when made for a *bona fide* sale for an adequate and full consideration in money or money's worth. The reason for that is obvious, and need not be discussed.

Then, however, Congress wisely realized that there would be many exchanges of property between parties, especially between members of families, in which a decedent might give property of a value in excess of that which he received in return therefor, and even though no sale was contemplated or took place in fact, yet there was an exchange of properties for a consideration. However, if the consideration was not adequate and full, Congress then provided that the excess of the fair market value at the date of death of the property transferred by decedent over that which he received should be included in his gross estate if made under conditions which brought the transfer within the purview of Sec. 811(c). This was all provided in Sec. 811(i) of the Internal Revenue Code,

which placed rules of limitation upon the value of property to be included in the gross estate resulting from the transfers, trusts, rights, or powers enumerated and described in Subsections (c), (d), and (f) of Sec. 811 of the Internal Revenue Code.

The Tax Court, in holding that the agreement in question constituted a transfer by the decedent of an interest in property which was not a bona fide sale to his surviving spouse, and therefore not within the purview of the exception provided in Sec. 811(c), states:

“The act does not include the word ‘exchange’, and that fact is significant.”

Thus The Tax Court clearly infers that the transaction involved was an exchange of the properties. It could do nothing else under its theory of the case because, certainly, if transfers occurred the decedent received the interest in the property which his surviving spouse had and she received the interest in the property which he had. Therefore the transaction fell squarely within the provisions of Sec. 811(i), and for reasons fully discussed under “A” above, the exchange was, beyond the peradventure of a doubt, for a consideration in money or money’s worth, the decedent receiving certainly as much in property value as he transferred, and the money or money’s worth of the property has already been determined by the Commissioner in this case. Therefore there was no excess of the fair market value at the time of death of the property transferred by him on account of the transaction over the value of the consideration received therefor by the decedent.

The principles enunciated are so logical that they do not bear of question, and the Commissioner himself has uti-

lized the same in making determinations involving transfers made in contemplation of death. *Schoenheit*, 14 B. T. A. 44, remanded *Schoenheit v. Lucas*, 44 F. 2d 476, only for determination of the value of the stock transferred. The Commissioner had included the difference between the price received for the stock of \$63.74 per share and the value determined by him at the date of death of \$149.00 per share in the gross estate of the decedent, because the transfer was made in contemplation of death. The Board of Tax Appeals affirmed the determination by the Commissioner of only including the excess of the value as required by Sec. 811(i), and the Circuit Court of Appeals agreed that such was correct, but was not satisfied with the value of \$149.00 per share. Again, in the recent case of *Liebman v. Hassett* (C. C. A. 1, 1945), 148 F. 2d 247, the Circuit Court of Appeals affirmed the decision of the District Court that the value at date of death of the decedent of an insurance policy transferred in contemplation of death should be reduced by the amount of premiums paid by the transferee after the transfer. Thus only the excess of the value at date of death of the property transferred over that received was included, and the principle of Sec. 811(i) was followed.

In *Sec. 93*, "*Hughes Federal Death Tax*," there appears the following:

"If the property conveyed was of greater value than the consideration paid for it then only the excess is includible in the gross estate."

Thus, upon any approach to the case, and giving full weight to every contention that could possibly be advanced by the respondent, there remains the uncontroverted fact that under the applicable provisions of the Internal Reve-

nue Code the petitioner reported at least the value of the interest which the decedent had in the property in question at the date of his death. This being so, and the respondent's determination not being in accordance with the law, and the re-determination of The Tax Court not following the applicable decisions and the law, it should be reversed.

Now that the offensive provisions of the Revenue Act of 1942 have been repealed as to the estate tax and are no longer in effect as to gift tax involving community property after April 2, 1948, the Bureau of Internal Revenue has issued a ruling in respect of the taxation of gifts upon a conversion of tenancy by the entirety to tenancy in common. The effect of this ruling is to recognize the principles of Sec. 811(i) and Sec. 1002 of the Internal Revenue Code. The ruling is designated "*Special Ruling*," and was promulgated October 1, 1948, signed by D. S. Bliss, Acting Deputy Commissioner, published as *Paragraph 6028 of C. C. H. "Estate and Gift Tax Reports."*

What has taken place finally is simply this: That, belatedly, the Bureau has come to realize that it has got to give effect to Secs. 811(i) and 1002 of the Internal Revenue Code where parties owning equal interests in property partition or change their legal ownership of the same with each other. Under the provisions of the Code the mandate of Congress is perfectly clear, that only that part of the excess of the value of property exchanged, where a bona fide sale for an adequate and full consideration in money or money's worth does not exist, shall be subject to tax. As before pointed out, all transfers, whether for estate tax purposes or for gift tax purposes, are so limited by the provisions of Secs. 811(i) and 1002 of the Code.

In the *Taurog* case, *supra*, the decision of The Tax Court is sound for this very reason, although there does not appear to have been any evidence in the case as to the respective ages of the parties divorced. Even if Judge Disney should be correct in his dissenting opinion in that case, that the division of community property did not constitute an adequate and full consideration in money or money's worth, then the remaining provisions of Sec. 1002 are brought into play, and by the express terms of that section it is "provided that where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall for the purposes of the tax imposed by this chapter be deemed a gift, and shall be included in computing the amount of the gifts made during the calendar year."

Since in California the wife owns fully and completely one-half of the property, and a division of the property is made pursuant to a divorce decree or any other type of division, and if it be considered that a transfer from one to the other occurs, certainly the value of the property received by the husband has to be equal to the value of the property received by the wife, with only the nebulous exception of the difference in ages which is contemplated by the special ruling. Thus, if *Taurog* was older than his wife, instead of there being any taxable gift by him it was the reverse, because what he received was greater in value than that which he gave and Mrs. *Taurog* would then have been the donor.

This principle was pointed out by Judge Van Fossan of The Tax Court in the case of the *Estate of Lester L.*

Fletcher, supra, and which doctrine was likely the progenitor of the special ruling under discussion.

How there can be any differentiation between a conversion of property held in tenancy by the entirety into tenancy in common, of property held in joint tenancy into tenancy in common, and of property held as community property into tenancy in common, is not explainable. The ruling attempts to differentiate between conversions of joint tenancy in California from that of the conversions of tenancy by the entirety in Oregon by stating that in California either tenant may sever his interest at any time without the consent of the other. No explanation is attempted to show why that right creates any difference, but if a difference there be between those two, then by the Bureau's own reasoning conversion of property held as community property would fit squarely within the special ruling because neither party could at any time sever his interest in the community without the consent of the other.

In short, and in summation, even if a transfer occurred of decedent's property by the agreement of December 2, 1942, decedent received in exchange therefor at least the equal of that which he transferred in value, obviously money or money's worth, and hence under the provisions of Sec. 811(i) of the Code, there was no excess of value to be included in the gross estate for estate tax purposes. Therefore, the petitioner, having returned at least the value of the property owned by the decedent at the date of his death, there cannot result any deficiency in respect of the estate tax liability in this case.

POINT VIII.

Petitioner Overpaid the Estate Tax Liability of the Estate of the Decedent, and Is Entitled to a Refund.

The evidence is uncontroverted that petitioner reported on the estate tax return of the estate of the decedent a gross estate in excess of the value of the interest in property owned by decedent at the date of his death. There was inadvertently included in the gross estate 40 shares of guaranteed capital stock of Home Builders' Loan Association of Pomona, California, of the agreed value of \$9,000.00. There was included in the gross estate all the cash on deposit at the First National Bank of Pomona, California, in the sum of \$23,988.66. There was included in the gross estate all the United States Treasury "E" bonds and accrued interest of an agreed value of \$6,397.13. There was included in the gross estate the agreed values of two automobiles in the respective amounts of \$1,415.00 and \$1,280.00.

Pursuant to the agreement of December 2, 1942, decedent's surviving spouse owned one-half of the property and decedent owned one-half. Therefore the gross estate was overstated by one-half of the agreed amounts. The mere fact that petitioner erroneously included the full value of these items in the estate tax return does not prevent a refund upon a determination of the correct tax liability of the estate.

Estate of Lester L. Fletcher, supra.

Further, petitioner has incurred additional expenses on behalf of the estate in the prosecution of this appeal. These included court costs, costs of printing the record, and briefs

and attorney's fees, which were not determinate at the time the estate tax return was filed, and the tax paid.

Therefore, petitioner is entitled to a refund of estate tax paid over the amount owed, and for reasons set forth heretofore the decision of The Tax Court should be reversed and the case remanded, with instructions to The Tax Court to determine the amount of the refund due.

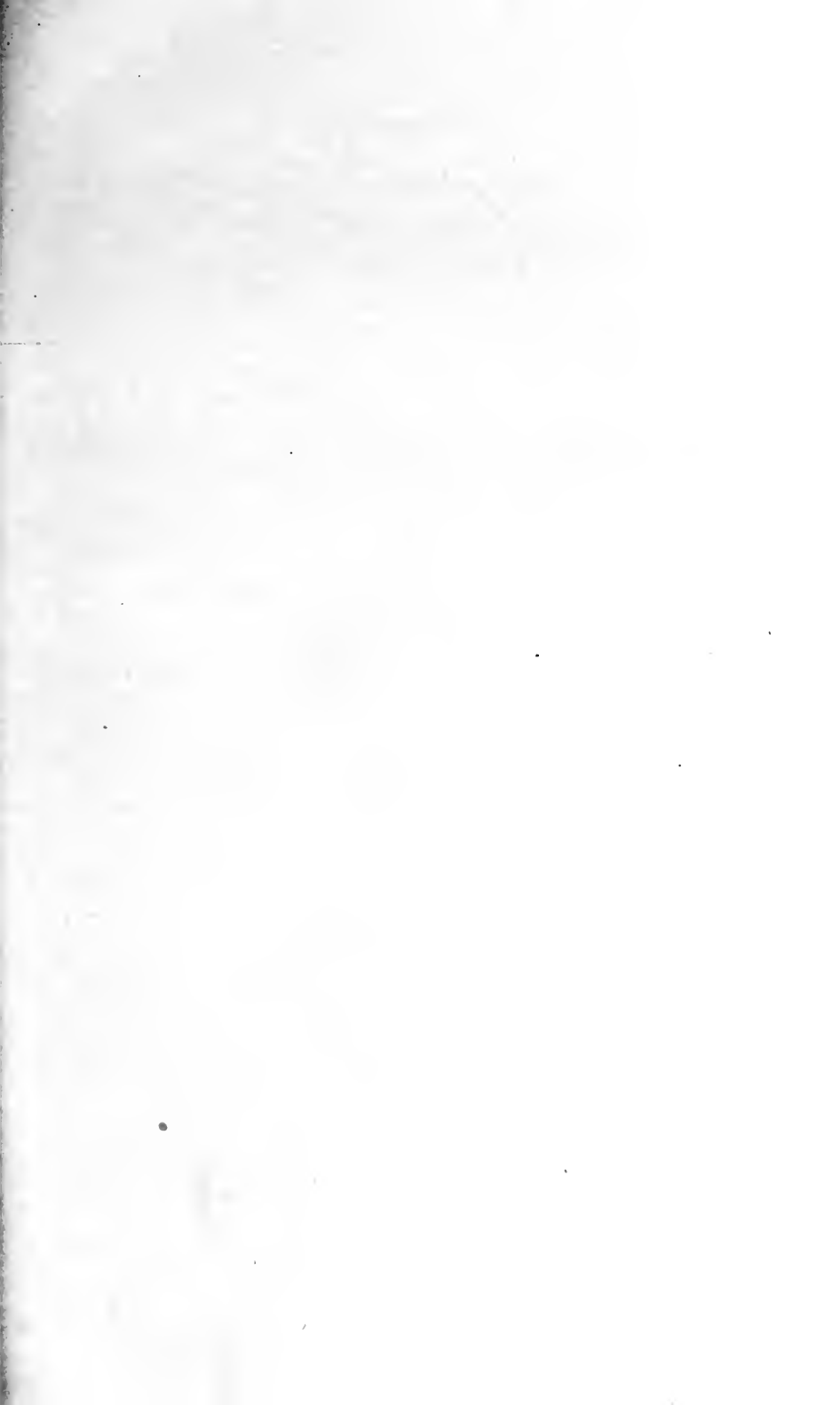
Conclusion.

It is respectfully submitted that the decision of The Tax Court cannot stand. As has hereinbefore been shown, its holding that the primary and dominant purpose of the decedent in making the agreement of December 2, 1942, was to escape estate taxes is not supported by an iota of evidence, and its conclusion, predicated on that erroneous inference, is likewise erroneous as not being in accord with the decided cases of the Supreme Court and the Circuit Court of Appeals and its own later decisions deciding the precise point oppositely.

Therefore, the decision of The Tax Court should be reversed, the petitioner awarded her costs, and the case remanded for determination of the amount of refund due the petitioner.

Respectfully submitted,

CHARLES J. MUNZ, JR.,
Attorney for Petitioner.





APPENDIX.

The following are the applicable provisions of the Internal Revenue Code in effect during the period involved herein from October 21, 1942, through the calendar year 1944:

* * * * *

“SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) DECEDENT'S INTEREST.—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's

worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter ;

(d) REVOCABLE TRANSFERS.—

* * * * *

(5) TRANSFERS OF COMMUNITY PROPERTY IN CONTEMPLATION OF DEATH, ETC.—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

* * * * *

(i) TRANSFERS FOR INSUFFICIENT CONSIDERATION.—If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent."

The following are the related Gift tax provisions of the Internal Revenue Code in effect during the same period:

“SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

* * * * *

(d) COMMUNITY PROPERTY.—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.

* * * * *

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.”

“TREASURY REGULATIONS 105, SEC. 81.15. (As amended by T. D. 5239, Mar. 10, 1943.) Transfers during life.—* * *

In the case of estates of decedents dying after October 21, 1942, a transfer to a third party or third parties of property held as community property by the decedent and spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered, in accordance with section 811(d)(5), as added by section 402(a) of the Revenue Act of 1942, for the purposes of this section and sections 81.16 through 81.21, inclusive, to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. The same statutory provisions apply in the case of a division of such community property between the decedent and spouse into separate property, and in the case of a transfer of any part of the community property into separate property of such spouse; in such cases, the value of the property which becomes the separate property of such spouse, with the exception stated in the preceding sentence, shall be included in the gross estate of the decedent under section 811(c) or section 811(d), if the other conditions of taxability under such sections exist. * * *

* * * * *

No. 12091

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LORAIN T. RICKENBURG, Executrix of the Estate of
Edwin W. Rickenberg, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

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FILED

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REPLY BRIEF FOR PETITIONER.

Reply is herewith made to the arguments presented in the brief for the respondent in the order there made under I, II and III.

I.

Under Point I of the respondent's brief there is some discussion of the effect of the agreement of December 2, 1942, upon pre-1927 community property.

It is submitted that there is no issue before the Court involving pre-1927 community property. The respondent's determination was that the property was joint tenancy property. At the trial he proceeded on the theory that a division of community property occurred by transfers into common property [R. 62]. No issue was ever raised at the trial or in the pleadings that any of the property was

pre-1927 community property. The point should be passed because not properly raised.

Helvering v. Salvage (1936), 297 U. S. 106.

The next point made under Argument I of the respondent's brief is summarized on page 22 thereof and is:

"That by the agreement converting the community property into property held by tenancy in common, the decedent divested himself of—*i. e.*, he 'transferred' within the meaning of Section 811 (c)—the very interest he had in the property which would have required its inclusion in his gross estate at his death under Section 811 (e) (2). Since such divestment at death satisfies the constitutional requirement that there be a transfer at death (see *Fernandez v. Wiener, supra*), it obviously also satisfies the requirements of Section 811 (c) in that regard.

"We therefore submit that the decedent has made a transfer of an interest which he had in the property within the meaning of that section."

This argument is advanced in answer to petitioner's argument under Point II of her brief, pages 26 to 31, inclusive, that no interest in property was transferred by the decedent to his wife by the agreement of December 2, 1942. Respondent arrives at his conclusion after quoting from the opinion of *Fernandez v. Wiener* (1945), 326 U. S. 340, 355, appearing on pages 20 and 21 of his brief. It is submitted that the opinion in that case does not hold that a transfer of an interest in decedent Wiener's community held property to his surviving spouse occurred at his death. The Court held that it was the changes in the legal and economic relationships brought about by death which the legislative power could recognize and levy a tax

on the happening of the event which was their generating source.

In the quoted excerpts from the Supreme Court's opinion it is manifest that the Supreme Court very carefully instructed the lower courts and the bar that no interest in the community property was transferred to the surviving spouse upon the death of a decedent. The Supreme Court took full cognizance of and reaffirmed its earlier decisions that each spouse "owned" their respective shares of the community property. No interest in the property was transferred to the surviving spouse by virtue of death. The Supreme Court's opinion is replete with statements that all that occurs upon the death of a decedent owning community property is that the surviving spouse owns his or her property unrestricted and unfettered by any other powers and restrictions theretofore existing.

It is the cessation at death of the powers and restrictions over the property which furnish the appropriate occasions for the imposition of the tax. It was not the transfer of any interest in property that brought about the tax in the *Wiener* case.

Had the next paragraph of the Supreme Court's opinion in the *Wiener* case been quoted in respondent's brief the writers of the brief would have found a complete answer in the negative that a transfer of an interest in community property does not take effect in California at the death of one of the spouses holding their property as community property. The part of that paragraph which is pertinent is as follows:

"The principles which sustain the present tax against due process objections are precisely those which sustained the California tax, measured by the entire value of community property in *Moffitt v.*

Kelly, *supra*. There the court recognized that the surviving wife took her share of the property on her husband's death, not as an heir, but as an owner of an interest, the right to which she acquired before the death and before the enactment of the taxing act. But the levy upon the entire value of the community was sustained, not as a tax upon property or the transfer of it, but as a tax upon the 'vesting of the wife's right of possession and enjoyment, arising upon the death of her husband' [218 U. S. 400, 31 S. Ct. 80], which the court deemed an appropriate subject of taxation, notwithstanding the contract, equal protection and due process clauses of the Constitution. * * *

Similar statements contained in the opinion are as follows:

"* * * As the tax is upon the surrender of old incidents of property by the decedent and the acquisition of new by the survivor, it is appropriately measured by the value of the property to which these incidents attach. * * *

"We find no basis for the contention that the tax is arbitrary and capricious because it taxes transfers at death and also the shifting at death of particular incidents of property. * * *

"* * * Apart from the exemption, it is, as we have seen, the shifting at death of the incidents of the property, regardless of origin, which is the subject of the tax."

It is thus clear from the Supreme Court's own opinion that it drew a clear line of demarcation between a transfer of an interest in property subject to the federal estate tax and a cessation relinquishment or redistribution of powers

and restrictions over property resulting from the death of a decedent owning property held as community property which also was held to be subject to the federal estate tax.

The respondent has predicated its argument on this point on the holding of the Supreme Court in the case of *Fernandes v. Wiener, supra*. It has been shown that that decision holds that a transfer of the interest in property held as community property did not take place upon the death of the decedent Wiener, hence the basic premise of the Government's syllogism is erroneous. It follows *a fortiori* that its conclusion that a transfer of an interest in property within the meaning of Section 811 (c) is likewise erroneous.

The Government has failed to show what, if anything, constituted the interest in property which it claims decedent transferred by the agreement of December 2, 1942.

These vague incidents which attach peculiarly to community property cannot be severed from the property itself and hence could not be alone the subject of a transfer. Further, their very nature is such that they do not constitute under any theory of law an interest in property.

The power of management and control over community property enjoyed by the decedent was held by this Court not to be an interest in property in the case of *United States v. Goodyear* (C. C. A. 9, 1938), 99 F. 2d 523. It was there pointed out that such was analogous to an agency. And clearly a person may have control over property as an agent without having any interest in the property itself. Hence upon his death the cessation of that control or power over the property, or any such incident relative thereto, could not possibly, under any theory of law, constitute a transfer of an interest in property. Likewise,

a relinquishment or surrender of such incidents during life could not by the same token constitute a transfer of an interest in property.

The third point advanced by the brief of the respondent, to the effect that former Section 811 (d) (5) of the Internal Revenue Code involved herein should be also construed to be applicable to divisions of property held as community property between husband and wife, has been fully answered in Point III of petitioner's brief, pages 32 to 35, inclusive, and needs no further comment here.

II.

The argument contained in respondent's brief under Point II, that the transfer here in question was not a bona fide sale for an adequate and full consideration in money or money's worth within the meaning of Section 811 (c) of the Code, pages 25 to 36, inclusive, thereof, has been fully answered in petitioner's brief, briefs of the *amici curiae* and the dissenting opinion of Judge Hill to the majority opinion of The Tax Court [R. 36-40] and merits no further reply.

III.

Petitioner submits that all of the argument advanced in respondent's brief under Point III, pages 37 to 47, inclusive, thereof, have been fully met in her opening brief. However, a clarifying statement on the basic question involved of whether there was a transfer of an interest in property made by the decedent by the agreement of December 2, 1942, in contemplation of death within the meaning of Section 811 (c), is deemed appropriate.

The close parallel of the essential facts in the instant case to those in the case of *Allen v. Trust Co. of Georgia*

(1946), 326 U. S. 630, require the application of the principles decided in that case to this case, *i. e.*, a gift made to perfect ownership is not within the ban of Section 811 (c) of the Code even though it is done for the purpose of saving estate taxes.

A rearrangement of legal incidents of title which decedent and his surviving spouse had in their property so as to place the title in the form which the parties always intended to own their property, and to thus eliminate the surviving spouse's share of the property from inclusion in the gross estate of the decedent, is precisely analogous to the factual situation in the case of *Allen v. Trust Co. of Georgia, supra*. In that case the release of the power of amendment of the trusts was done to correct the trusts to perfect ownership even though the decedent Spalding, a lawyer himself, well knew and was advised that such act would serve to avoid the inclusion of the trusts in his gross estate and thus escape estate taxes thereon.

In the instant case the rearrangement of title was done to correct the earlier title holding to perfect ownership. The decedent Rickenberg was not even aware that any tax saving was being accomplished because he had been advised by tax counsel that changes in the estate tax law would not be effective upon such an agreement until January 1, 1943, and he acted on December 2, 1942. This makes the instant case even stronger.

Both petitioner and the Government are in accord that the quoted excerpt of the opinion from the case of *Allen v. Trust Co. of Georgia* (1946), 326 U. S. 630, 635, quoted at page 43 of respondent's brief, lays down the law controlling in the premises.

A simple statement of the facts will show why neither the instant case nor the case of *Allen v. Trust Co. of Georgia* is within the rule of law of Section 811 (c) of the Code laid down in that opinion. In that case the principle is stated:

“Since the purpose of the contemplation of death provision was to reach substitutes for testamentary dispositions in order to prevent evasions of the tax (*United States v. Wells, supra*, pp. 116-117), the statute is satisfied, it is said, where for any reason the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some manner affect its devolution.”

In the instant case the evidence establishes that decedent and his surviving spouse intended to own their property separately in equal shares. They thought they had accomplished such ownership by holding it in joint tenancy. The evidence is uncontroverted that the decedent became concerned with what was going to happen to the *property owned by his wife* at his death and not what was going to happen to *his property* at his death.

The decedent had no ownership in the property owned by his wife. This is true whether held in joint tenancy or as community, as has been fully substantiated by unquestioned authority in petitioner's opening brief and the briefs *amici curiae*. (*Fernandez v. Wiener, supra*.) The decedent made no effort whatsoever to dispose of his property prior to his death by the agreement of December 2, 1942. He merely executed the agreement to make certain that his wife would have title to her property in full legal, as well as equitable, ownership. As pointed out in the opening brief, had the decedent been concerned about

what would happen to *his property* at his death he would have made a gift of his property and would not have executed an agreement which merely changed the legal tenure but left him with the exact property which he had before.

Likewise in the *Trust Co. of Georgia* case the decedent Spalding was not concerned with what was going to happen to his property. He was concerned with what was going to happen to the property in the trusts which he had given away and had no ownership thereof. Hence the Court held that his release of the power to amend was not within the rule of law.

Therefore, by respondent's own argument applying the doctrine of the *Trust Co. of Georgia* case the agreement of December 2, 1942, did not constitute a transfer of an interest in property by the decedent within the meaning of Section 811 (c) of the Code.

Finally, without attempting to make any reply respondent seeks to brush off the argument advanced by petitioner in B, Point VII, of her opening brief, pages 67 to 73, inclusive, that Section 811 (i) of the Internal Revenue Code is controlling in the premises if the Court should hold that the agreement of December 2, 1942, constituted a transfer of an interest in property in contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code. Petitioner agrees that Section 811 (i) would have no relevancy if Section 811 (c) *is not* applicable, but as fully explained in petitioner's opening brief Section 811 (i) is applicable if the Court holds there were transfers within the meaning of Section 811 (c).

The argument set forth in respondent's brief is patently without logic.

The Government's case is simply that there were cross transfers of interests in property between the decedent and his surviving spouse by virtue of the agreement of December 2, 1942. The Government further contends that the transfer of decedent's interest in property, accomplished by the agreement of December 2, 1942, was made in contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code.

Petitioner contends, *inter alia*, that if a transfer of an interest of decedent's property was made by the agreement of December 2, 1942, that it was a bona fide sale for an adequate and full consideration in money and money's worth within the exception provided in Section 811 (c), and therefore the value of the interest was not includable in the gross estate of the decedent at his death.

The respondent in his brief replies and devotes the greater part of his brief to the argument that the decedent did not receive adequate and full consideration in money or money's worth for the interests in property so transferred by him and therefore the exception in Section 811 (c) is not applicable.

Since the Government's case is that there was an exchange of properties and the transfer by decedent was not a bona fide sale for an adequate and full consideration in money or money's worth, then it must have been a transfer for a consideration in money or money's worth within the meaning of Section 811 (i) of the Code. That section in final analysis is dispositive of the case in favor of the petitioner.

Conclusion.

The arguments advanced in the brief for respondent have failed to answer the points in the opening brief of petitioner which demonstrate that the decision of The Tax Court was erroneous. It therefore follows that the decision should be reversed and remanded for the reasons fully set forth in petitioner's briefs.

Respectfully submitted,

CHARLES J. MUNZ, JR.,

Attorney for Petitioner.

In The United States Court of Appeals
For the Ninth Circuit

THOMAS L. OLDFIELD, *Appellant,*
vs.
SS ARTHUR P. FAIRFIELD, her engines, boilers, tackle,
apparel and furniture, and American Pacific Steam-
ship Company (a corporation), *Appellees.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

BOGLE, BOGLE & GATES,
EDW. S. FRANKLIN,
Proctors for Appellees.

603 Central Building,
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In The United States Court of Appeals
For the Ninth Circuit

THOMAS L. OLDFIELD, *Appellant,*

vs.

SS ARTHUR P. FAIRFIELD, her engines,
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and American Pacific Steamship Com-
pany (a corporation), *Appellees.*

No. 12092

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

APPELLEES' STATEMENT OF THE CASE

This libel was brought by appellant, a seaman aboard the SS ARTHUR P. FAIRFIELD, to originally recover the sum of \$479.20 which had been deducted from his pay by the Master of the vessel as his pro rata share of a fine levied against the vessel at Rotterdam, Holland, July 21, 1947, by Customs Officials of the Kingdom of the Netherlands in the amount of \$3,018.00. The fine was imposed as the result of finding 126 cartons of undeclared cigarettes secreted about the vessel.

Just before the trial of the case, appellees obtained a partial remission of the fine assessed against the vessel, which resulted in a pro rata credit to appellant of the amount of \$368.24, reducing the amount in litigation to the sum of \$110.96.

At the trial of the case, appellant did not appear to testify, nor was any testimony offered in his behalf. Appellees introduced the depositions of the Master of

the vessel, Captain Corbin, Chief Mate Plikat and Purser Davis. Their testimony may be summarized briefly as follows:

Appellant joined the SS ARTHUR P. FAIRFIELD as an officers' B. R. Waiter in May of 1947 at San Francisco, California. The vessel was destined for Rotterdam, Holland, and other European ports. About two or three days out of Rotterdam, appellant approached Purser Davis and desired to purchase ten additional cartons of cigarettes. He offered to pay Davis \$1.00 per carton, although the slop chest price per carton was \$.75.

Appellant was the union delegate of the Stewards' Department. When the vessel reached Rotterdam on the morning of July 21, 1947, Purser Davis told appellant and other union delegates aboard the vessel that the Dutch Customs Officials would only permit one carton of cigarettes per man during the stay of the vessel in Rotterdam and that all excess cartons would have to be delivered to him and placed in the slop chest and sealed until the vessel departed from Rotterdam.

A search of the vessel later that day by Customs Officials of the Dutch Government resulted in the finding of a number of contraband cartons of cigarettes which were confiscated by the Dutch officials. Nineteen cartons were found in the officers' saloon where appellant was employed. As a result of the seizure, the Dutch Government levied a fine of \$3,018.00 against the vessel, which the Master was obliged to pay to procure the release of the vessel.

After the payment of the fine, Captain Corbin thereupon addressed the ship's company and advised them that unless the identity of the individuals who were responsible for the secreting of the contraband cigarettes was disclosed to him that he would limit further shore leave. As a result, one Burke, the delegate of the Deck Department, called upon Captain Corbin with a list of names of those implicated in the attempted smuggling, which revealed that appellant had secreted nineteen cartons of the contraband cigarettes. Thereupon appellant and others involved in the matter were duly logged.

Subsequently, appellant advised Chief Mate Plikat that he was responsible for the attempted smuggling of nineteen cartons of cigarettes.

When the vessel paid off October 14, 1947, at Portland, Oregon, appellant protested the forfeiture of his wages to the Shipping Commissioner. Appellant stated he threw the cigarettes overboard before the vessel arrived at Rotterdam, but could not produce a witness to substantiate this contention.

The deck delegate, Burke, was then called before the Shipping Commissioner and in appellant's presence told the Shipping Commissioner that appellant had informed him, Burke, that he was responsible for nineteen cartons of the contraband cigarettes and for this reason his name was included on the list furnished Captain Corbin by Burke.

The Shipping Commissioner thereupon sustained the logging of appellant and wage forfeiture.

SUMMARY OF DISTRICT COURT'S OPINION

Judge Bowen's opinion (Ap. 82, 82½ and 83) denying appellant a recovery (except for his pro rata share of the remitted fine amounting to \$479.20, for which appellant was given judgment) was based upon the undisputed fact that appellant had caused damage to the vessel by his illegal conduct; that both under the general Maritime Law and equitable principles the appellees were entitled to recoupment of the damage suffered by wage forfeiture. Judge Bowen was of the further opinion that the logging of appellant and the withholding of his wages for the amount of damage caused the vessel was further authorized by the provisions of Title 46 U.S.C.A., Sec. 701, Paragraphs Seven and Eight. Appropriate findings of fact and conclusions of law were entered in conformity with Judge Bowen's opinion (Ap. 18-23, inc.).

ERRONEOUS BASIS OF APPEAL

Appellant in his brief contends that the deduction of his wages could only be made under Paragraph Eight of Title 46 U.S.C.A., Sec. 701. To define the term "smuggling" employed in Paragraph Eight, *supra*, he resorts to Sec. 2865 Revised Statutes and criminal cases decided thereunder.

Sec. 2865 Revised Statutes makes criminal the completed act of smuggling articles into the United States with the intent to defraud the revenue of the United States. The statutes and authorities cited by appellant are not relevant at bar. The acts of appellant were a breach of the customs laws of the Kingdom of The Netherlands as indicated by the translation of the ap-

plicable Dutch Customs regulations, designated "Respondents' Exhibit A-1" (Ap. 30-34, incl.).

APPLICABLE STATUTE

The applicable statutes for consideration in this appeal are Title 46 U.S.C.A., Sec. 701, 702 and 705, which read as follows:

"Sec. 701. Various offenses; penalties

Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amounting to desertion, by forfeiture from his wages of not more than two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute.

Third. For quitting the vessel without leave, after her arrival at the port of her delivery and before she is placed in security, by forfeiture from his wages of not more than one month's pay.

Fourth. For willful disobedience to any lawful command at sea, by being, at the option of the master, placed in irons until such disobedience

shall cease, and upon arrival in port by forfeiture from his wages of not more than four days' pay, or, at the discretion of the court, by imprisonment for not more than one month.

Fifth. For continued willful disobedience to lawful command or continued willful neglect of duty at sea, by being, at the option of the master, placed in irons, on bread and water, with full rations every fifth day, until such disobedience shall cease, and upon arrival in port by forfeiture, for every twenty-four hours, continuance of such disobedience or neglect, of a sum of not more than twelve days' pay, or by imprisonment for not more than three months, at the discretion of the court.

Sixth. For assaulting any master, mate, pilot, engineer, or staff officer, by imprisonment for not more than two years.

Seventh. For willfully damaging the vessel, or embezzling or willfully damaging any of the stores or cargo, by forfeiture out of his wages of a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, by imprisonment for not more than twelve months.

Eighth. For any act of smuggling for which he is convicted and whereby loss or damage is occasioned to the master or owner, he shall be liable to pay such master or owner such a sum as is sufficient to reimburse the master or owner for such loss or damage and the whole or any part of his wages may be retained in satisfaction or on account of such liability, and he shall be liable to imprisonment for a period of not more than twelve months. R.S. Sec. 4596; Dec. 21, 1898, c. 28, Sec. 19, 30 Stat. 760; Mar. 4, 1915, c. 153, Sec. 7, 38

Stat. 1166; Aug. 1, 1939, c. 409, Sec. 6, 53 Stat. 1147."

"Sec. 702. Entry of offense in log book

Upon the commission of any of the offenses enumerated in section 701 of this title an entry thereof shall be made in the official log book on the day on which the offense was committed, and shall be signed by the master and by the mate or one of the crew; and the offender, if still in the vessel, shall, before her next arrival at any port, or, if she is at the time in port, before her departure therefrom, be furnished with a copy of such entry, and have the same read over distinctly and audibly to him, and may thereupon make such a reply thereto as he thinks fit; and a statement that a copy of the entry has been so furnished, or the same has been so read over, together with his reply, if any, made by the offender, shall likewise be entered and signed in the same manner. In any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof the court hearing the case may, at its discretion, refuse to receive evidence of the offense. R.S. Sec. 4597; Dec. 21, 1898, c. 28, Sec. 20, 30 Stat. 761."

"Sec. 705. Enforcement of forfeitures

Any question concerning the forfeiture of, or deductions from, the wages of any seaman or apprentice may be determined in any proceeding lawfully instituted with respect to such wages, notwithstanding the offense in respect of which such question arises, though made punishable by imprisonment as well as forfeiture, has not been made the subject of any criminal proceeding. R.S. Sec. 4603."

These statutes derive from the Act of June 7, 1872, c. 322, Sec. 51, 17 Stat. 273, 274 and 275.

They were obviously intended by Congress as a Marine Code to regulate internal discipline aboard merchant vessels of the United States. The determination of the occurrence of an infraction of these provisions is primarily delegated to the Master of the vessel as well as initially prescribing the punishment therefor. The Master is required by Sec. 702, *supra*, to log the offense for which he convicts the seaman, inform him of the same and the convicted seaman is given a copy of the logging.

ANSWER TO APPELLANT'S FIRST AND SECOND ASSIGNMENTS OF ERROR

To bring the retention by appellees of appellant's wages within the provisions of Paragraph Eight of Sec. 701, *supra*, three elements are necessary: (1) any act of smuggling; (2) for which the seaman is convicted; and (3) whereby loss or damage is occasioned to the vessel.

Since there is no question that the vessel was damaged by the necessity of paying the customs fine of \$3,018.00 to procure its release from arrest by the Customs Officials of the Kingdom of The Netherlands, consideration of the first two elements alone are requisite.

DID APPELLANT COMMIT AN ACT OF SMUGGLING?

It is to be noted that Paragraph Eight of Sec. 701, *supra*, is very broad in scope and encompasses within its prohibition "any act of smuggling." Thus, it refers to all preliminary acts incident to a completed act of smuggling and not merely the completed act of smuggling itself.

Appellant obviously was engaged in attempting to smuggle ashore nineteen cartons of cigarettes in violation of the Dutch Customs Laws. His illegal scheme was frustrated by the discovery of the cigarettes and his illegal purpose defeated.

That the preliminary act of secreting contraband merchandise aboard a vessel in violation of the customs laws of a foreign nation is an act of smuggling for which the seaman's wages can be forfeited was decided in 1848 in the case of *Scott v. Russell*, Fed. Cas. No. 12546, 21 Fed. Cas. page 849, where, in a strikingly similar factual situation District Judge Betts held an act of smuggling had been committed:

"BETTS, District Judge. It is sufficiently proved that the libellant clandestinely carried on board the vessel in New York a considerable quantity of tobacco, and that, immediately on the arrival of the vessel in Liverpool, a very similar quantity was found secreted under the caboose occupied by him as cook. This is, I think, sufficient evidence that he took on board the tobacco there detected, and that his misconduct caused the arrest of the vessel. If it were the fact, as suggested by counsel, that there were two distinct parcels of tobacco discovered, it would not have been difficult for the libellant to have produced evidence tend-

ing to show what disposal was made by him of the portion which it is amply proved he carried on board. In the absence of any evidence of that character, it is fair to presume that the parcels were the same; especially as the place of concealment was peculiarly accessible to the libellant.

“For a seaman wilfully to commit an act of dishonesty or fraud, which exposes the vessel to jeopardy, is a breach of the duty and fidelity which he owes to the ship. Such act amounts to barratry. (3 Durn. & E. (3 Term R.) 277; 2 Caines, 222; Wesk. Inst. tit. ‘Barratry’), and may be considered in diminution or in bar of his wages (Curt. Merch. Seam. 118). The wrong may be used by the ship-owner to countervail the seaman’s suit for wages, without resorting to a cross-action to that end. The libellant, if not a British subject, was shipped in a British port, and must be presumed cognizant of a law so notorious as that smuggling tobacco into Great Britain subjects the vessel to the danger of confiscation. Carrying the tobacco on board clandestinely, and keeping it closely concealed in port, imports his consciousness that the act was unlawful. His conduct must, therefore, be regarded as a gross violation of duty, attended with expense and delay to the ship, for which it is proper to impose a subtraction of wages by way of correction and amends.”

WAS THERE A CONVICTION OF APPELLANT?

The evidence in this case establishes that after the imposition of the fine on the vessel, Captain Corbin made an investigation to determine the identity of those seamen guilty of illegally secreting the cartons of cigarettes. This resulted in the disclosure to the Master that appellant had secreted nineteen of the contraband cartons. Captain Corbin upon this evidence determined that appellant had committed an act of smuggling and convicted him of this offense and recorded this conviction in the log of the vessel, carefully following the procedure prescribed by Sec. 702, *supra*, for logging the commission of the offense.

Parenthetically, it may be observed there is no question of appellant's guilt. After the logging he admitted the same to Chief Mate Plikat (Ap. 64).

Furthermore, when paid off at Portland, Oregon, at the end of the voyage, appellant submitted the propriety of the deduction of his wages to the Shipping Commissioner. This procedure is authorized under Title 46 U.S.C.A. Sec. 651 and 652. In the presence of the Shipping Commissioner and in the presence of appellant, Burke, the seamen's delegate, advised the Shipping Commissioner that appellant had admitted his secreting the nineteen cartons of cigarettes, with which he was convicted.

A consideration of Sec. 701, *supra*, and its obvious purposes will indicate that initial determination of the commission of offense therein enumerated must be made by the Master. Since the preservation of discipline aboard a merchant vessel requires prompt puni-

tive measures be taken not only by way of punishment to the guilty seamen but as a deterrent to his shipmates, Congress, by Paragraph Eight, *supra*, gave the Master the initial authority to convict a seaman of the offenses prescribed by the statute. The determination by Captain Corbin that appellant was guilty of an act of attempted smuggling and his logging therefore under Sec. 702, *supra*, constituted a "conviction" of appellant for this offense.

As a protection against unjust, harsh or oppressive action by the Master, in the matter of deducting a seaman's wages, Sec. 702, *supra*, provides an elaborate system of logging and publicizing the offense for which the seaman is convicted.

Furthermore, an appeal from the Master's logging resulting in deduction of a seaman's wages can be taken to the United States Shipping Commissioner under Title 46, U.S.C.A. Sec. 651 and Sec. 652, such as was done by appellant. A judicial review (such as was taken here) is further authorized under Sec. 705, *supra*.

In the event that the seaman has been unjustly imprisoned aboard the vessel by the Master for violation of the provisions of Sec. 701, *supra*, he has his action for damages for such unlawful conduct.

It is submitted that the trial court was correct in ordering the forfeiture of appellant's wages under the Eighth Paragraph of Sec. 701, *supra*.

ANSWER TO APPELLANT'S THIRD AND FOURTH ASSIGNMENTS OF ERROR

The trial court also found the forfeiture of appellant's wages authorized by Paragraph Seven of Title 46 U.S.C.A. Sec. 701, *supra*, which reads as follows:

"Seventh. For wilfully damaging the vessel, or embezzling or wilfully damaging any of the stores or cargo, by forfeiture out of his wages of a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, by imprisonment for not more than twelve months."

This is merely a recent codification of the ancient admiralty rule that any seaman whose conduct causes damage to the vessel is responsible therefor. The rule is sometimes referred to as based upon equitable considerations.

This ancient right of recoupment has been recently referred to by the Second Circuit in the case of *Shilman v. United States*, 164 F.(2d) 649, which involved the right of the vessel to offset seamen's wages.

"(2) The cases cited by the appellees in support of a set off of \$200 all fall within the category of expenses incurred on behalf of the ship in connection with the voyage. Sometimes they have related to hiring a substitute for a deserting seaman or for securing his return; sometimes for making the vessel good out of a seaman's wages for medical expenses occasioned by his assault on a member of the crew; at other times they have been deductions for a smuggling of goods which subjected the vessel to jeopardy or for allowing a stowaway to be on board. *Swanson et al. v. Torrey et al.*, 4 Cir., 25 F. 2d 835; *The Ellen Little*, D.C. Mass., 246 F. 151; *The W. F. Babcock*,

2 Cir. 85 F. 978; *The T. F. Whiton*, D.C. S.D. N.Y., Fed. Cas. No. 13,849; *Snell et al. v. The Independence*, D.C. E.D. Pa., Fed. Cas. No. 13,139; *Scott v. Russell*, D.C. S.D. N.Y., Fed. Cas. No. 12,546; *Magee v. The Moss*, D.C. E.D. Pa., Fed. Cas. No. 8944."

Smuggling with consequent loss to the vessel or its owner has invariably been recognized as giving the ship-owner the right to set off damages incurred by the vessel because of the commission of such offense. The rule of *Scott v. Russell*, *supra*, was followed in the case of *The Horace E. Bell*, Fed. Cas. No. 6,702, 12 Fed. Cas. page 526, where the court said:

"* * * That there was smuggling is admitted, and I think that the evidence in the case sufficiently proves that the libellants were concerned in it. But the smuggling was not sufficient to forfeit the vessel, which, if it had been over \$400 in value, it would have done. Laws U.S. (Stat. 1797, Sec. 5). The master alone was arrested, and he paid a fine of fifty dollars. If this suit had been against him, this would have been an equitable as well as legal defence. It is admitted, that on the part of seamen, this is a grave offence and ought not to be lightly passed over. * * *."

In the case of *Willard v. Dorr*, Fed. Cas. No. 17,680, 29 Fed. Cas. page 1277, Judge Story, writing the court's opinion, said at page 1280:

"* * * Smuggling on the part of a master is a criminal departure from duty and a rank offence, calling upon the court for its most decided reprobation. Where it is gross in its circumstances, and attended with serious damage or loss to the owner, it is such a violation of the master's contract, as may be justly visited with the penalty

of forfeiture of wages. And under the most venial and favorable circumstances, the damages actually sustained by the owner may be charged upon the wages of the master, and deducted by way of diminished compensation therefrom. * * *."

The legal basis of such offsets in the opinion of Judge Story is as follows:

"* * * The set-offs allowed in the admiralty are principally those, in which advances have been made upon the credit of the particular debt or demand, for which the plaintiff sues; or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence; or as a restitution in value for damages sustained in consequence of gross violations of the contract for such services. * * *."

In the case of *The Ellen Little*, 246 Fed. 151, the court said:

"The alleged deduction rests, therefore, upon a right asserted under the general maritime law to deduct from the wages of an officer damages caused to the vessel by his failure to serve faithfully. See *Willard v. Dorr*, Fed. Cas. No. 17,680; *Scott v. Russell*, Fed. Cas. No. 12,546; *The T. F. Whiton*, Fed. Cas. No. 13,849; *The Marjory Brown* (D.C.) 134 Fed. 999. * * *."

In *The Coniscliff*, 266 Fed. 959, the court said:

"The claim of the answer for reimbursement is not based upon any request of libellant that he be sent to the hospital, but upon the doctrine of the general maritime law, giving a right to deduct from the wages of an officer damages caused to the vessel by his wrongful act or fail-

ure to serve faithfully. *Willard v. Dorr*, Fed. Cas. No. 17,680; *Scott v. Russell*, Fed. Cas. No. 12,546; *The T. F. Whitton*, Fed. Cas. No. 13,849; *The Marjory Brown* (D.C.) 134 Fed. 999; *The Ellen Little* (D.C.) 246 Fed. 151."

In *The T. F. Whitton*, Fed. Cas. No. 13,849, 23 Fed. Cas. page 873, the court said:

"* * * That such an act on the part of a seaman, whereby the vessel suffers damage or is put to expense, is to be considered in diminution of a claim for wages, has often been held. *Scott v. Russell* (Case No. 12,546); *Brown v. The Neptune* (Id. 2,022); *The Tusker* (Id. 14,274)."

Since appellant's unlawful act inflicted damage upon the vessel, both under the authority of Paragraph Seven of Sec. 701, *supra*, and the general Maritime Law applicable, the vessel owner is entitled to a forfeiture of appellants' wages to the extent he caused damage to the vessel and the lower court was correct in so decreeing.

ANSWER TO APPELLANT'S FIFTH ASSIGNMENT OF ERROR

The trial court upon being advised by appellees' counsel that the fine assessed against the vessel had been partially remitted by the Dutch Government just before the trial of the cause in the United States District Court at Seattle, Washington, on July 20, 1948, resulting in a credit to appellant of the sum of \$368.24, entered a judgment in appellant's favor for his pro rata share of the remitted fine and decreed neither party were entitled to their costs.

The disallowance to appellant of his costs is claimed to be erroneous.

The allowance of costs in an admiralty case is always a matter in the discretion of the court.

The Maggie J. Smith, 123 U.S. 349, 31 L. ed. 175, 8 Sup. Ct. Rep. 159;

The Sapphire, 85 U.S. (18 Wall.) 51, 21 L. ed. 814.

Benedict on Admiralty, 1940 Edition, Volume 3, page 229, states the rule to be:

“* * * Costs generally follow the decree, but circumstances of equity, of hardship, of oppression or of negligence induce the court to depart from that rule in a great variety of cases. Costs are sometimes from equitable considerations denied to the party who recovers his demand and are sometimes given to a libellant who fails to recover anything, when he was misled to commence the suit by the act of the other party. * * *”

In the case of *The Lily*, decided by this circuit March 16, 1934, 69 F.(2d) 898, the court said:

“* * * Libellants contend that it was an error for the trial court to tax costs against libellants. In admiralty the matter of costs rests in the discretion of the trial court and very wide latitude has been exercised. In the absence of a clear abuse of that discretion the trial court's determination will not be disturbed on appeal. *The Maggie J. Smith*, 123 U.S. 349, 356, 8 S. Ct. 159, 31 L. ed. 175; *The Lyra* (C.C.A.) 255 F. 667; Benedict on Admiralty (5th ed.) vol. 1, p. 520.”

We respectfully submit there was no abuse of discretion by the District Court in refusing to award ap-

pellant costs, since appellant's unlawful conduct caused damage and expense to the appellees, not only by the imposition of the original fine on the vessel but also in subsequent expenses incurred by appellees in procuring a substantial remission of the same, by which appellant's original liability was substantially diminished.

CONCLUSION

We submit the decree of the trial court was correct and should be affirmed. To follow appellant's theory of the applicable law would constitute an open invitation to seamen on American merchant vessels to flagrantly flaunt the customs laws of foreign nations, to subject our merchant vessels to seizure or fine at the hands of those offended sovereignties and then to permit the guilty parties to escape all financial responsibility for their illegal acts and the damage caused thereby. We cannot conceive that sound public policy will be served by such a result nor than Congress intended such a result by the enactment of Sections 701 and 702, *supra*.

Respectfully submitted,

BOGLE, BOGLE & GATES,
EDW. S. FRANKLIN,

Proctors for Appellees.

No. 12,092

IN THE
United States Court of Appeals
For the Ninth Circuit

THOMAS L. OLDFIELD,

Appellant,

VS.

SS ARTHUR P. FAIRFIELD, her engines,
boilers, tackle, apparel and furni-
ture, and AMERICAN PACIFIC STEAM-
SHIP COMPANY (a corporation),

Appellees.

Upon Appeal from the District Court of the United States for the
Western District of Washington, Northern Division.

APPELLANT'S PETITION FOR A REHEARING.

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EDWIN J. FRIEDMAN,

Northern Life Tower, Seattle 1, Washington,

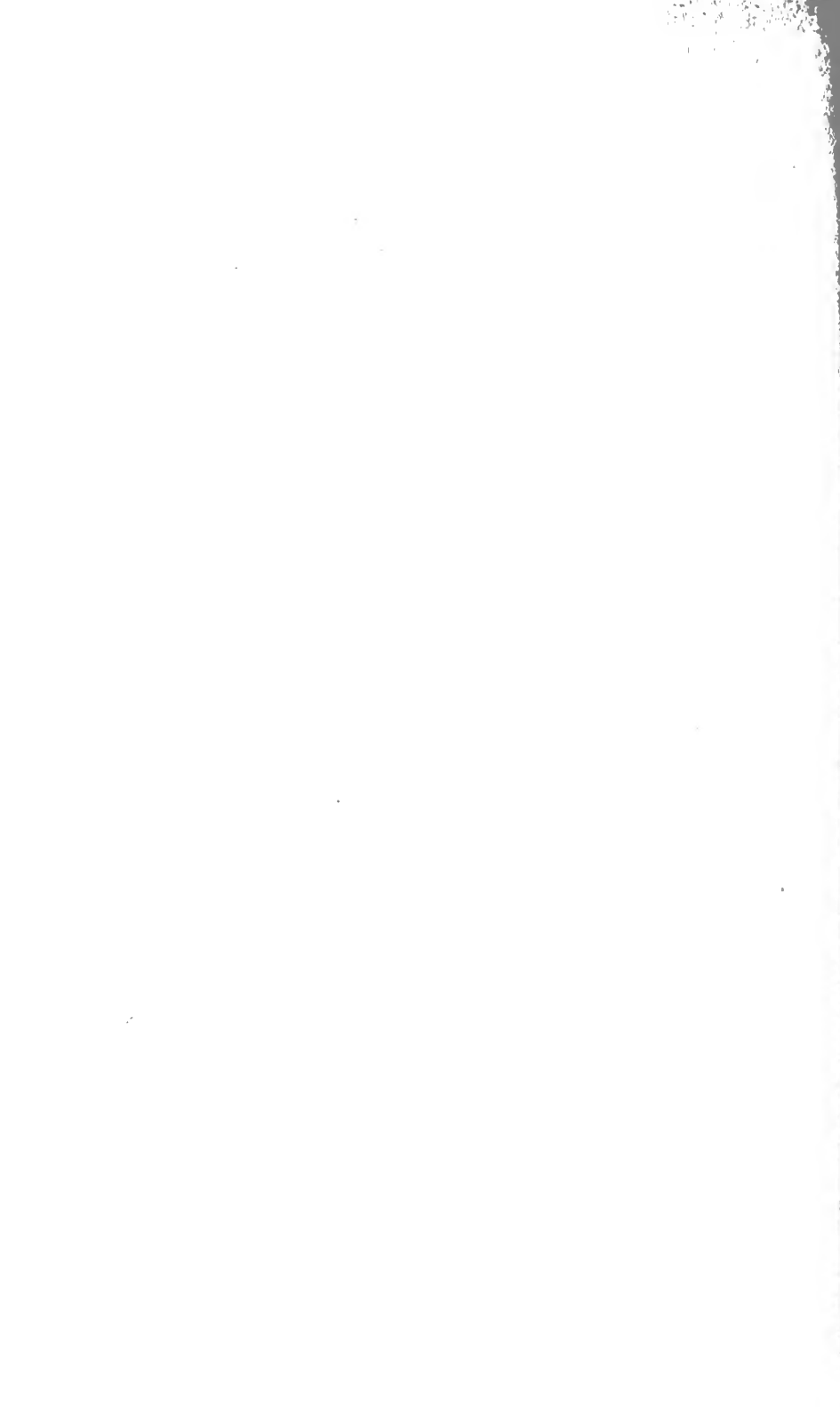
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and Petitioner.*

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PAUL D. BRIEN,

CLERK



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No. 12,092

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Appellees.

Upon Appeal from the District Court of the United States for the
Western District of Washington, Northern Division.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

The libelant respectfully petitions the court for a rehearing of his appeal and for reconsideration thereof, and in support of his petition respectfully represents that the court has erred in its interpretation and application of the statutes as follows:

I.

**SECTION 705, TITLE 46 U. S. C. A. HAS BEEN MISAPPLIED
AND ERRONEOUSLY CONSTRUED.**

The court has in effect held that Section 705 of Title 46 U. S. C. A. permits a seaman to be tried and "convicted" subsequent to the forfeiture. It is respectfully submitted that this statute cannot be construed to enable a shipowner to impose a forfeiture where no such right existed when the forfeiture was declared.

Some of the offenses set forth in Section 701 of Title 46 for which a forfeiture of wages is provided could be made the subject matter of a criminal proceeding. Imprisonment is a possible penalty provided by the act. Wilfully damaging the vessel, embezzling or wilfully damaging the stores or cargo are among the offenses punishable by imprisonment. A forfeiture of wages could also be made for such offenses even though they had not been the subject of a criminal proceeding. That Section 705 was intended to cover this situation is made clear by the words:

* * * notwithstanding the offense in respect of which such question arises, *though made punishable by imprisonment as well as forfeiture*, has not been made the subject of any criminal proceeding. (Italics ours.)

The right to make the forfeiture of wages must exist at the time the forfeiture is made. The right to make a forfeiture under Paragraph Eight of Section 701 does not exist until there has been an act of

smuggling “*for which he is convicted.*” The word “convicted” is in the past tense. Until there had been a conviction there was no right to make the forfeiture. This court now reads the statute as though it contained these words: for which he is convicted or might be convicted in any proceeding lawfully instituted with respect to such wages. The statute does not so read and should not be so construed.

II.

SECTION 701, TITLE 46 U. S. C. A. LIMITS AND RESTRICTS THE MASTER'S OR SHIPOWNER'S ANCIENT RIGHT OF RECOUPMENT BY FORFEITURE OF WAGES.

The court has declined to give effect to a statute clearly intended to modify the ancient right of a master or shipowner to impose forfeitures of wages to accomplish recoupment for losses caused by misconduct. *Shilman v. United States*, 164 Fed. (2d) 652 is cited as authority for the proposition that the ancient right of recoupment has “recently been recognized.” This case, as we read the opinion, gives no support to such a proposition. In that case the right of “recoupment”, if such it could be called, was denied and a recovery to the seaman for his wages was allowed against the government whose agents had attempted to collect a fine imposed for theft by deducting the amount of the fine from his wages. The court merely pointed out that the collection of the fine was not the same as recoupment for a loss oc-

curring during the course of a voyage and caused by misconduct. The cases cited were held inapplicable upon that ground. In the case at bar they are inapplicable because they were decided prior to the enactment of the statute which appellant claims was intended to correct the evil caused by the harshness of those very decisions.

For more than one hundred years (1833-1941) the statutory federal courts of this nation refused to recognize a limitation which Congress placed upon *their* power to punish for contempt. The climax in the court's determination to sustain its ancient right to punish for contempt was reached by the Supreme Court in 1918 in the case of *Toledo Newspaper Co. v. United States*, 247 U.S. 402; 38 S. Ct. 560 wherein Justice White erroneously declared:

* * * there can be no doubt that the provision [Section 385 Title 28 U. S. C. A.] conferred no power not already granted and imposed no limitations not already existing.

The law remained just that way until Justice Douglas exposed the error in the case of *Nye v. United States*, 313 U. S. 33, 61 S. Ct. 810 where he said:

Congress was responding to grievances arising out of the exercise of judicial power as dramatized by the Peck impeachment proceedings. Congress was intent on curtailing that power.

So in the case at bar Congress for its own reasons placed limitations upon the power of masters or ship-owners to impose forfeitures. These limitations should

be respected, and the statute, like other statutes relating to forfeitures and penalties should be strictly construed. See Judge Bourquin's decision in *Gordon v. United States et al.*, 298 Fed. 555 construing the very statutes here involved.

CONCLUSION.

The court is of the opinion that the act in question was passed "to mitigate the intolerable conditions of seamen then existing." Are we to infer that the court believes that these conditions no longer exist, and, therefore, the plain terms of the statute can be ignored?

The court says that it is possible to reconcile its results with the provisions of the act, but it declines to do so, stating that it will not pursue "barren dialectics." We have been unable to reconcile the trial court's decision with the provisions of the act through dialectics or otherwise; hence, this appeal. The questions which we have presented by this appeal are still unanswered. Does "cynical contempt" for the regulations of a greedy European power (Tr. 73) furnish a legal excuse and relieve an appellate court from the performance of a plain duty? If the affirmance of the decree requires the pursuit of barren dialectics, the more readily will the error of the lower court be exposed. The court's aversion to libellant's "furtive hangdog claims" affords no legal excuse to dispose of his appeal upon general prin-

ciples without regard to the statutes governing the transaction. A rehearing should be granted.

Dated, Portland, Oregon,
July 18, 1949.

Respectfully submitted,
K. C. TANNER,
SAMUEL L. LEVINSON,
EDWIN J. FRIEDMAN,
*Proctors for Appellant
and Petitioner.*

CERTIFICATE

I hereby certify that I am one of appellant's counsel; that I prepared the foregoing petition for rehearing, and in my judgment it is well-founded. I further certify that said petition is not interposed for delay.

K. C. TANNER,
Of Counsel.



No. 12,093

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHANNES FREDERICK BECHTEL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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PAUL P. O'BRIEN,

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No. 12,093

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHANNES FREDERICK BECHTEL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

**STATEMENT OF THE PLEADINGS AND FACTS
DISCLOSING BASIS OF COURTS' JURISDICTIONS.**

This is an appeal by the appellant, Johannes Frederick Bechtel, a naturalized citizen of the United States residing in Alameda County, California, from a final judgment (R. 62) of the U. S. District Court for the Northern District of California, Southern Division, entered against him in a suit in equity cancelling a final naturalization judgment of the Superior Court of California in and for the County of Alameda entered on February 23, 1934, upon the ground that it had been procured through the instrumentality of intrinsic fraud.

The bill in equity was filed under the asserted authority of Title 8 USCA, Sec. 738, on Dec. 22, 1942. (R. 1.) The final judgment of the court below cancelling the state Court's judgment naturalizing him was entered on March 31, 1944 (R. 62), based upon findings against the Bund (R. 41) and against the appellant. (R. 55.) His motion for a new trial (R. 69) was ordered denied on April 7, 1944. (R. 72-73.) On July 26, 1944, the appellant filed his notice of appeal from that judgment to this Court on questions of law and of fact (R. 74), together with his bond for costs on appeal. (R. 75.) The opinion of the Court below is reported in 54 F. S. 63, 81.

The plaintiff asserted the District Court below had jurisdiction to entertain the bill by virtue of the provisions of Title 8 USCA, Sec. 738, a fact disputed by appellant below and here. What jurisdiction, if any that Court had, arose thereunder or under Title 28 USCA, Sec. 41 (1), now Title 28 USCA, Secs. 1331 and 1345.

This Court has jurisdiction on appeal to review the judgment of the Court below by virtue of the provisions of Title 28 USCA, Sec. 225 (a) First, now Title 28 USCA, Sec. 1291.

The pleadings necessary to show the existence of the jurisdictions are the complaint (R. 1); the answer (R. 4) and supplement to answer (R. 11); motion for judgment on the pleadings (R. 22) and for hearing special defenses (R. 26); findings (R. 41) and (R. 55); judgment (R. 62); and notice of appeal. (R. 74.)

**STATUTES THE VALIDITY AND APPLICATION OF
WHICH ARE INVOLVED.**

1. Title 8 USCA, Sec. 738 (a), enacted December 14, 1940, which provides as follows:

(2) "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

2. Title 8 USCA, Sec. 738 (e), which provides, as follows:

(e) "When a person shall be convicted under this chapter of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

3. Title 8 USCA, Sec. 738(g), which provides, as follows:

(g) "The provisions of this section shall apply not only to any naturalization granted and to cer-

tificates of naturalization and citizenship issued under the provisions of this chapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court."

Note:

Sec. 738 (e) is part of the Nationality Act of 1940 and was derived, in part, from 8 USCA, Sec. 405, which related to civil cancellation of certificates, and, in part, from 8 USCA, Sec. 414, which related to the crime of procuring naturalization certificates. Both those prior laws were repealed when the Nationality Act of 1940 was enacted. Inasmuch as Sec. 738 (e) refers to criminal convictions the section seems to have no application to the instant case for, were it so construed, it would be void as an ex post facto or retroactive law. Sec. 738 (g), was derived from the repealed 8 USCA, Sec. 405, and appears to be void for uncertainty as to whether it applies to civil or criminal cases and also for being an ex post facto or retroactive law.

QUESTIONS INVOLVED.

1. Can a final naturalization judgment rendered by a state Court of competent jurisdiction be nullified by an attack launched in a federal Court?
2. Can a denaturalization judgment be justified by the imputation of a mental reservation of foreign allegiance at the time of naturalization, *nunc pro*

tunc, when the mental reservation rests upon evidence which failed to meet the requirements of the "clear, unequivocal and convincing evidence" rule?

STATEMENT OF THE CASE.

(The Consolidated Bund Trial)

The plaintiff produced a series of witnesses before the trial Court to testify to the limited issue that the German-American Bund and its precursor and affiliate organizations were subversive in design and character. (That matter, however, had no bearing on the issues involved insofar as the individual defendants were concerned.) It succeeded in demonstrating only that the national leaders of those organizations in the East who were admitted subversive characters may have intended and designed the West Coast "locals" for ultimate conversion into quasi-subversive organizations. However, these purposes were concealed from all but the "leaders". (Bund R. 159.)

In consequence, the associative "units" or "locals" spread throughout the country were in an amorphous formative stage and constituted nothing more than Bund "innocents clubs". Through these social clubs the national leaders drew unsuspecting immigrants and deludable citizens into their orbit for the purpose of exploiting them financially for the private profit of the leadership. The procedure was to stupefy their prospective victims by harangues in guttural German and English on economic topics while they enjoyed

the exhilarating effects of nothing stronger than locally manufactured beer, a modern form of gymnastics which passes for dancing and the doubtful pleasure of viewing travelogues depicting current economic events in Germany. In this manner the leadership hoped to induce them into a belief the economic policies of the then rising new Germany, under the tutelage of Corporal Hitler, was accomplishing miracles for the German proletariat and peasantry in particular and the German bourgeoisie in general.

Perhaps, through the medium of ceaseless crude propaganda to be dinned into their ears at a later date, the Bund leadership may have hoped to wean their victims from their pristine state of political ignorance to an acceptance of the political philosophy of Nazism to which these subversive national "leaders" long had been committed. However, all that they did insofar as West Coast units were concerned was to emphasize the evils of what they were boorish enough to believe was communistic Jewry which they asserted was exemplified by the overlords of the Soviet Union. Paradoxically, the communist Soviet Union, under the tutelage of Stalin, the Kha Khan of Tartary whose geo-political horizon encompasses the world has been quite as anti-semitic as the barbarian Hitler whose horizon was limited to Mittel Europa. It has liquidated countless innocent Jews under the plea they were counter-revolutionaries, running dogs of capitalism, Trotskyite enemies or simply Muzhik betrayers of the new "Fatherland"

that long had been known as "Mother Russia". Whether the Bund leadership expected to persuade their victims into becoming half-baked or full-fledged Nazis in course of time is a matter for speculation. No such conclusion can be drawn from the record herein. There is no evidence in the record of the Bund herein that the aims of its leaders were to overthrow the U. S. government by force or violence or to capture political power here by hook or crook or that the local organizations advocated any such things. Their objective was the development and promotion of a body of organized public opinion in the U. S., favorable to the economic aspirations of the New Germany, while they played the financial role of parasites to the members of the organizations who constituted the gullible hosts. In 1938 the national bund-leader Fritz Kuhn was tried and convicted on a charge of embezzling Bund funds.

We do not penalize the Stalinites and their dupes who hover within the lunatic fringe for their opinions, activities and associations by seeking to denaturalize them. This oppressive procedure has been reserved by our good Attorneys General for the exclusive detriment of former German nationals. When, long after having been admitted to citizenship with our blessings, they have committed the unforgivable crime of entertaining opinions and discussing views not shared by the majority or have been deceived by such organizations as the Bund we institute proceedings to decitizenize them. In this manner they are punished for possessing unstable minds, that is, minds that

have shed opinions with the elapse of time and acquired new ones with the shifting of political, social and economic conditions or because they have had the misfortune to associate with persons or join organizations we deem suspect. The method of punishment is through tardily imputing to them a mental reservation of foreign allegiance at the time of naturalization, *ab initio*, by unreliable proof of opinions, conduct and associations long since then.

To this end the plaintiff, alias the Attorney General, under the misnomer of "The United States of America", a device utilized with historic legal sanction to induce the populace into a belief the nation is the interested plaintiff, searched low for witnesses to aid its case. It paraded before the judicial servant of the Republic at the trial below the most respectable witnesses it could find and select for that purpose. Out of the shadow of the prison and the gutter it brought a number of subversive national "leaders" of the Bund to degrade and incriminate themselves with glib shamelessness. One of them was a self-confessed degenerate and ex-convict. (Bund R. 297.) Another, following a pattern laid down in like cases, disgraced the stand with a sanctimonious shroud of mystery by insisting on the privilege of testifying under the fictitious name of "John Doe". These then are the "good witnesses and true" the plaintiff produced before the trial Court to testify concerning the Bund and so, by a process of induction, against insignificant, beer-drinking, harmless members of the little social club "locals" who became dupes for the final time. No

attempt had been made by the government to denaturalize or punish these thoroughly disreputable witnesses upon whom the mantle of citizenship still rests securely with governmental approval.

It is a pity that we participate in the outrage of denaturalization. We do so because we are taught not to question or criticize what passes for "governmental policy" but to do blindly what is bidden us. Thus does prosecution become the tool of persecution. The practice of denaturalization lies quiescent in time of peace but springs into operation in time of war. Although it serves as a medium of government publicity to inflame public passion against naturalized citizens who were born in a country with which we are at war, it is a double-edged sword for it also teaches scrutinizing minds that government itself has more than a spark of savagery in its very nature and is all too willing to sacrifice personal rights we have been accustomed to regard as precious.

(Appellant's Individual Trial)

The appellant, by occupation a gardner, filed his declaration to become a citizen on April 29, 1927. (R. 93, 106, Exh. 1). He filed his petition for citizenship in the Superior Court of California, in and for Alameda County, on November 22, 1933. (R. 93, Exh. 1.) It was granted in an adverse proceeding before that Court on February 23, 1934. (R. 93, Exh. 1; R. 345-358.) The appellant appeared in that Court and was examined in open Court by the Superior Court judge and by the naturalization examiner who

represented the federal government. (See testimony of deputy clerk Kingston, R. 345 to 359, explaining the matter in detail.) Thereupon a final judgment granting the appellant citizenship was entered in the proceeding and recorded in Vol. 74 at page 112 of Petitions for Naturalization in the Alameda County Clerk's office. (R. 345.) (R. 385-389.) This was a formal final judgment of that Court.

The appellant was born in Germany on May 24, 1900. (R. 105.) He graduated from grammar school and had a little occupational training as a gardener. (R. 105, 360.) He served as a private in the German Army for five months in World War I. (R. 105, 361.) He became a member of the Social Democratic Party in Germany while still a minor, following the conclusion of that war. (R. 361, 394.) Because of his sensitiveness against violence he saw displayed in the Kapp Putsch he left Germany when he was 20 years of age and went to Sweden. (R. 361.) Five years later, in 1925, he migrated to the United States (R. 362, 365) and finally made his home in Oakland. (R. 363.) He was married in 1928 (R. 172) and is the father of a daughter who was 13 years of age at the time of the trial. (R. 364.) He acquired a home in Oakland, is a taxpayer and voter. He attended evening schools. (R. 367.) He is a Lutheran. (R. 367.) He has no police record. (R. 367-8.) He joined a singing society (R. 368) and the fraternal orders, Herman Sons and the Redmen. (R. 369.)

While his wife was on vacation in September or October, 1934, he received an invitation in the mail

(R. 170) to attend a social to be held in the Pioneer House, Oakland, given by the Friends of New Germany. He attended. Because it was opposed to communism and the naturalization judge had required him to give his word to defend the Constitution against communism which was devoted to overthrowing the government by force and violence and in destroying religion and all private property (R. 399) he later signed a membership application card. (R. 370.) He had been informed and believed it was a patriotic organization (R. 400) opposed to "Communism" (R. 374, 400, 148) and also to the importation of "National Socialism" to this country. (R. 374.) It celebrated Washington's birthday and its members sang the Star Spangled Banner. (R. 374-5.) The members never heiled Hitler. (R. 374.) It was dissolved in 1935 or 1936. (R. 107.)

In 1936 (R. 372) he became a member of the German American Bund and paid 75¢ dues per month. (R. 377.) On occasions he wore a white shirt, black belt and an arm band bearing a swastika and a chauffeur's cap which later was replaced by an overseas cap. (R. 378.) He acted as an usher at a number of the Oakland local's socials and did janitor work for the organization. (R. 378.) The members celebrated Washington's birthday and other national holidays. (R. 380.) He heard that the German consul and the German government were opposed to the Bund. (R. 381.) He did not there or elsewhere hear that the Bund advocated a "blood theory," the "fuehrer principle," the principles of national socialism or anti-

semitism. (R. 172, 381-2.) He did learn that it was opposed to propaganda against the new Germany, (R. 382), and heard "very much" discussion of the economic policies of Germany under the Hitler regime. (R. 382.)

Jessen first met appellant in August 1937 at a dance to which he invited appellant. (R. 97-99) (90.) The Concord High School Band furnished the music. (R. 391.) Hein and Jessen tried to sign up persons as members of a new local but succeeded in signing up only three persons. (R. 98.) The appellant knew nothing of their activities. (R. 391.) The appellant never read Mein Kampf (R. 147) and didn't originally know what the word Aryan meant. (R. 116.) He is not anti-Semitic. His two physicians were Jewish. (R. 412-3.) He personally recommended a Jewish friend, Bert Golden, for membership in the Friends of New Germany who thereafter attended. (R. 117, 178.)

When he became a citizen in 1934 he fully and completely renounced any and all foreign allegiance to Germany without any mental reservation. (R. 120-1.) During his subsequent membership in the Oakland local of the Friends of New Germany and the Bund he studied the U. S. Constitution. He originally saw nothing inconsistent with their activities, as observed and known to him, that was incompatible with allegiance to the U. S. (R. 120-1.) He neither knew nor had any reason to know that the Friends of New Germany, the Bund, the Oakland local or the officers of these were "crooked" until he viewed the docu-

mentary evidence concerning the Bund at the pre-trial in this proceeding. (R. 401.) He had been deceived into believing these were patriotic American societies. (R. 400.) The Bund record shows that the national leaders practiced this deception upon innocent persons who became mere members. He was at all times ready, willing and able to bear arms against Germany and the Axis nations. (R. 121-3.) In 1938 he wrote an essay to Town Hall expressing his belief and faith in the U. S. Constitution and his ideas concerning our form of government. (Exh. B, R. 184-188.) Although this essay is not couched in impeccable English it would do credit to any immigrant or citizen.

His interest in Germany under the Hitler regime was limited to its general economic recovery program, the rebuilding of Germany and its solution of its unemployment problems. (R. 128-130.) He believed that Germany under a dictatorship could rebuild and solve its economic problems quicker than in a democracy but not as efficiently as in a democracy. (R. 131.) He was opposed to Germany's invasion of Austria and to the use of force against any country. (R. 417.)

The Friends of New Germany honored the American and German flags equally at its celebrations (R. 170), each being put in its proper place. (R. 171.) The appellant personally believed the U. S. flag should be given a preferred place of display. (R. 163, 416.) He never attended any April 20th celebration of Hitler's birthday (R. 176) or any celebration at which Hitler was honored. (R. 404.) He held a private party in his home on his wedding anniversary on

April 24, 1938 (R. 176, 389), at which the American and Swedish flags were displayed and a crepe swastika was on the ceiling. (R. 177, 389.) In 1938, he was present at a Bund picnic held in Dublin Canyon where a swastika was burned. (R. 181.) He watched over this fire to prevent it from spreading. (R. 183.) In the first week of 1939 (R. 112, 145, 382), because of a growing dissatisfaction with Bund policies (R. 404) and as a result of personal private quarrels with Hein whom he and others had excluded from a private orchestra (R. 382), and over Hein's speeches against Jews (R. 383) and because Hein was trying to run the local Bund like a dictator, (R. 112-3, 384, 397), he resigned his membership. He was never an officer, leader or organizer of either organization. He was not a propagandist or distributor of literature. He was not a speaker for either. He was not anti-semitic. He did nothing to promote any subversive objective.

The gist of the plaintiff's case against the appellant is as follows: (1) he was a member of the Friends of New Germany from Sept. 1934, until it dissolved in 1935 or 1936; (2) he was a member of the German American Bund from 1936 to 1939; (3) on occasions he wore a black belt, white shirt, arm band and first a chauffeur's cap and later an overseas cap at a few meetings of those organizations; (4) on one wedding anniversary in 1938 he had a crepe swastika on his ceiling; (5) he was excluded from the West Coast by a military commander in 1942 and this order was revoked; (6) he watched over a fire in Dublin Canyon at a Bund picnic which was open to the public; (7)

he was opposed to the principles of Communism; (8) he subscribed to the *Wekruf Beobacher* for one year in 1938 (R. 145) to read about Fritz Kuhn who was tried on charges of embezzling Bund funds; (9) a witness testified he once carried a swastika flag through the foyer of the Pioneer House into the Bund meeting room; (10) the members sang the Star Spangled Banner and the anti-communist Horst Wessel song. (R. 148.)

The plaintiff's witnesses testified as follows:

Eldon J. Edwards, a tavern keeper, testified the appellant once stated in 1937 or 1938 the Jews were the cause of trouble in Germany. (R. 154.) His entire testimony was immaterial and hopelessly incredible and the trial judge so appears to have regarded it.

Mrs. Jeanne Eloise Atkins saw appellant in 1936-1938 wearing a Sam Browne belt, swastika arm band, white shirt and black tie at the Pioneer House; (she had been unable to identify the appellant in court (R. 190); at a Bund social held in the ballroom (R. 193) she once saw him carry the swastika flag across the foyer into the social hall. (R. 196.)

Rudolf Joseph Schall had known appellant since 1931 or 1933 (R. 199); appellant told him, at an unspecified time, that conditions in Germany were good according to a letter he had received from Germany. (R. 201.)

Robert Bach testified that the appellant in 1937, 1938, or 1939, stated that working conditions in Germany under Hitler were better than before (R. 217)

and that Jews who were being persecuted there should be given a country of their own where they could have their own government and be free from persecution (R. 217a) and that on appellant's tenth wedding anniversary in 1938 a swastika decoration was on the ceiling. (R. 217.)

Karl W. Boller testified that in 1938 at his wedding anniversary the appellant stated that something Boller had read in a newspaper was Jewish propaganda (R. 225); that appellant never discussed National Socialism or the political program of the Nazis. (R. 239.) This witness signed a statement prepared by an F. B. I. agent stating his opinion the appellant approved Hitler's program in Germany but that he did not advocate such a government for the U. S. (R. 227-229.) This opinion evidence was objected to (R. 218-235) and was improperly admitted without the plaintiff laying the foundation for impeachment of the witness on the ground of surprise. Cross-examination proved that the witness's statement referred to appellant's approval of the economic policies of Germany. (R. 238.)

Guenther R. Reinecke testified that in 1938 while attending the appellant's tenth anniversary celebration he saw a paper mache swastika on the ceiling (R. 249); and that the appellant approved of the German building program. (R. 252.)

Henry Koenig testified that the appellant stated to him at an unspecified time that conditions in Germany were a "little better" after Hitler assumed power. (R. 256.) He signed a statement prepared by an

F. B. I. agent stating that the appellant, in 1935 or 1936, talked about conditions in Germany and complained of poor conditions in the U. S. (R. 261); and on cross-examination testified that appellant's approval of Germany was restricted to approval of her solution of her internal building and employment program (R. 263) and that he never told the F. B. I. agent things would be better if a new order was here. (R. 263.)

Albert W. Kruse testified that in 1933 or 1934 (1938?) the appellant, comparing the condition of the common people stated they appeared to be better off economically in Germany than here during the depression (R. 269-270); that appellant offered him German language papers to read (R. 271); that appellant, referring to a newspaper article written against Germany, said "There it goes against the Jews" (R. 271); that in 1939 appellant said he would like to go back to Germany, but whether for a visit or permanently, the witness didn't recall. (R. 273.)

Arthur Cobbledick testified that the appellant told him the Nazis, at an unspecified time, prior to the war, were rather successful in meeting their unemployment problems (R. 275) and that the appellant felt that much of the disturbance or problems in Germany were to be blamed on the Jews. (R. 276.)

Mrs. Edna Bell Holman testified that in 1938 or 1939 the appellant believed it was right for the Jews in Germany to be sent to Palestine to make use of that country (R. 280); that the appellant wanted to take a trip to Germany to see how conditions there

were (R. 282); in 1939 or 1940 the appellant said that Jews oppressed by Hitler's regime should be permitted to leave Germany and establish a national homeland of their own (R. 287-288) and that he anticipated trouble involving the Jewish people in the United States (R. 288); that the appellant is "very truthful." (R. 291.)

The Defense Witnesses testified as follows:

Dr. Daniel Crosby testified that he had known appellant for 10 years (R. 296); and that the appellant has a reputation for dependability (R. 299), is truthful (R. 299), stable and reliable. (R. 299.)

Phil S. Gibson, Chief Justice of California, testified that he had known appellant since 1939 (R. 303); that appellant has a good reputation for truth and veracity (R. 304), is honest and reliable (R. 305), was proud of this country and his American citizenship (R. 305); the appellant had informed him that he had thought that Hitler and his followers would do something for the poor people in Germany and represent the common people of Germany against the military clique and oppose the spread of communism in Germany, but that he was disillusioned when the Russo-German pact was entered into (R. 306-7); that appellant stated the U. S. should provide a home for persecuted European Jews in Alaska (R. 307); that appellant told him he had been informed by the judge who naturalized him that it was one of his duties to fight communism and the spread of communism in

this country (R. 307); that before we were drawn into the war appellant was opposed to war anywhere (R. 307) and that in his opinion, appellant is a loyal citizen of the United States. (R. 308.)

Mrs. Lou Mitchell Young testified that she had known appellant since 1933 (R. 312); that appellant has a very fine reputation for truth and veracity (R. 313) and is a good worker; in 1938 or 1939, he told her he was opposed to communism (R. 313); that he had written an essay on the Constitution (R. 314, Exh. B), that he expressed the same sentiments regarding it to her, he believed in it and upheld it and was sincere (R. 314); that he was not opposed to Jews but to communists and Jews who were communists (R. 315); that he stated the oppressed Jews should be given a national homeland (R. 316); that he is a loyal citizen (R. 316); that she went to the F. B. I. and told them that appellant was talking perhaps too much about "Communism and Communistic Jews" and asked that Bureau to talk to him to protect him from getting into trouble in the event the U. S. entered the war (R. 320); that appellant had joined the Bund "Because he thought it was a 'social organization' " (R. 321) but had left it in 1938; that he is "honest, upright, straight-forward, and we trusted him implicitly." R. 321.)

H. E. Rohrbach testified that he had known appellant since 1928 or 1933 (R. 324); the appellant's reputation for truth and veracity is very good (R. 325); he is honest, reliable and law-abiding (R. 326), and

conducted himself as a good American citizen. (R. 326).

Edward N. Long testified that he had known appellant since 1938 (R. 333), the appellant was an efficient worker and very honest and dependable (R. 333); had stated he was glad to be a citizen, that he is trustworthy (R. 334) and was "always law-abiding." (R. 335.) This witness was a witness for appellant at his naturalization hearing. (R. 339.)

Ernest Hugo Herschell testified that he had known appellant since 1928 (R. 336); that he and his wife were witnesses for appellant at the time of his naturalization hearing in 1934. (R. 336).

Deputy County Clerk John Joseph Kingston testified that official records of the Superior Court show appellant, by adverse proceeding, was granted his petition for citizenship at a hearing on the petition. (R. 345-358.)

The contentions that the Court below had no jurisdiction over the cause, that the complaint in equity failed to state facts sufficient to constitute a cause of action and that the cause was *res judicata* and barred by laches were raised by the answer (R. 4) and supplemental answer (11), motion for judgment on the pleadings (R. 22), motion for hearing special defenses (R. 26) and motions for dismissal interposed at the opening and during the Bund trial (Bund R. 3, 24) and appellant's individual trial (R. 264), at the close of the plaintiff's evidence on Bund trial (R. 797) and appellant's individual trial (R. 359) and on the mo-

tion for a new trial (R. 69), each and all of which motions were denied. The insufficiency of the evidence to justify the judgment and the contention it was contrary to the evidence and law were raised on the motion for a new trial (R. 69) which was denied. (R. 72-3.)

SPECIFICATION OF ERRORS RELIED UPON.

The trial Court below erred in the following particulars:

1. In denying appellant's motion (R. 22) for judgment on the pleadings. (R. 294-6; 359) and (Bund R. 3, 24, 797).

2. In denying appellant's motion (R. 26) for dismissal of the cause on the special defenses contained in answer and in supplement thereto and for insufficiency of the evidence to establish a *prima facie* case. (R. 294-296, 359.)

3. In adopting plaintiff's findings of fact and conclusions of law.

4. In refusing to adopt appellant's proposed amendments (R. 39) to plaintiff's proposed findings of fact and conclusions of law on issues involved in consolidated Bund trial and in adopting those of plaintiff. (R. 41.)

5. In refusing to adopt appellant's proposed amendments (R. 65) to plaintiff's findings in his separate trial and in adopting those of plaintiff. (R. 55.)

6. In denying appellant's motion (R. 69) for a new trial. (R. 72-73.)

7. The complaint fails to state facts sufficient to constitute a cause of action against the appellant.

8. The Court below had no jurisdiction over the cause except to dismiss the complaint for want of jurisdiction.

9. The evidence is insufficient to justify the judgment.

10. The judgment is contrary to the evidence.

11. The judgment is contrary to law.

12. The trial Court erred in the reception and rejection of evidence, over appellant's objections.

13. The trial Court erred in denying appellant's motion for judgment on the pleadings and for dismissal of the complaint made at the opening of the consolidated Bund trial (Bund R. 3, 24) at the conclusion of plaintiff's evidence thereon and at the conclusion of the defense thereon. (Bund R. 797.)

14. The trial Court erred in denying appellant's motion for judgment on the pleadings and for dismissal of the complaint made at the conclusion of the plaintiff's evidence thereon (R. 294, 359) and at the conclusion of the defense's evidence thereon. (R. 359.)

**SPECIFICATION OF ERRORS IN THE ADMISSION
AND REJECTION OF EVIDENCE.**

1. The trial Court erred in permitting the appellant to be examined as an adverse witness over his objection that the plaintiff's interrogatories failed to specify he was to be called and the testimony expected to be elicited from him. (R. 105.)

2. The trial Court erred in permitting the appellant to be examined, over his objection, as to statements made by him to an army board which the government obtained from him upon a promise to keep them confidential. (R. 163-4.)

3. The trial Court erred in admitting evidence, over appellant's objection, to privileged communications between appellant and his wife, to the effect that she did not wish him to have anything to do with the Bund because other friends wanted nothing to do with the Bund. (R. 172-3.)

4. The trial Court erred in permitting plaintiff's witness, Mrs. Atkins, over appellant's objection, to testify that in 1938, four years after his naturalization, she saw him carry a swastika flag from the foyer to the ballroom of the Pioneer House. (R. 189-190.)

5. The trial Court erred in permitting the plaintiff's witnesses Schall, Bach, Boller, Reinecke, Koenig, Kruse, Cobbledick and Holman to testify to activities and expressions of the appellant since the time of his naturalization in 1934, over his running objections thereto that such testimony was too remote to bear on the issues involved and was immaterial. (R. 200-1.)

6. The trial Court erred in permitting the plaintiff's counsel to examine and impeach the plaintiff's own witnesses Schall (R. 202-209), Bach, Boller, Reinecke, Koenig and Holman (R. 218-223), over appellant's objections, as though they were hostile witnesses in the absence of laying a foundation of having been taken by surprise by them.

**SPECIFICATION OF ERRONEOUS FINDINGS OF FACT
AND CONCLUSIONS OF LAW.**

1. Finding No. IV, R. 56, is erroneous in stating that the appellant assisted in the activities of the organizations such as marching and carrying the swastika banner.

There is no evidence in the record that the appellant marched at any time. One witness only testified that she saw him once carry the swastika flag across the foyer of the Pioneer House in Oakland into the social hall (R. 196) and this witness originally was unable to identify the appellant in Court. (R. 190.)

2. Finding No. VI, R. 56, is erroneous in declaring that the appellant went with Gottfried Karl Hein, local bund leader, to Concord when the Concord unit was organized.

The evidence is conclusive that the appellant was invited to a dance at Concord and went there. (R. 391.) Hein and Jessen tried to form a unit there (R. 98) but this fact was not known to the appellant. (R. 391.)

3. Finding No. VIII, R. 57, is erroneous in stating that the appellant between 1934 and 1939 approved of Hitler's treatment of the Jews in Germany.

That finding is not only unsupported by the evidence but is contrary to the evidence.

4. Finding No. IX, R. 57, is erroneous in stating that the appellant on Dec. 14, 1942, stated to a U. S. Army Board that he honored the swastika flag equally with the American flag.

The evidence is undisputed that he stated to that board that the Friends of New Germany organization honored the American and German flags equally (R. 170) at its meetings, each flag being put in its proper place. (R. 171.) The evidence is uncontradicted that appellant personally believed the American flag always merited a preferred place of display. (R. 163, 416.)

5. Finding No. X, R. 57, is erroneous in stating the appellant knew and understood the leadership principle as enunciated and subscribed to by the leaders and members of the F.D.N.D. and G.A.B.

The evidence is indisputable that the leadership principle was not discussed in the presence of the appellant at the Oakland local which was in a mere formative stage. Neither there or elsewhere did the appellant hear any discussion of any such principle. (R. 172-381-2.)

6. Finding No. XIII, R. 58, is erroneous in stating that the appellant ceased attending meetings of the

G.A.B. solely because of personal disagreements with Gottfried Hein and not because of disagreement with the policies and ideologies of the G.A.B. itself.

The evidence is undisputed that the Oakland local was a Bund "innocents" club and that the national leaders concealed from mere local members what their subversive policies and ideologies were. There is no evidence that the appellant was informed of those policies and ideologies. The evidence is conclusive that appellant ceased attending meetings of the Bund in October, 1938, and resigned from the local in the first week of January, 1939, because of personal disagreements with Gottfried Hein over Hein's attempt to join their private orchestra (R. 382), over Hein's speeches in 1938 against Jews (R. 383), over Hein's method of conducting the Radio Hour program (R. 384), and because Hein was running the unit too much like a dictator and without consulting anyone (R. 112-3, 384, 397) and because of a growing dissatisfaction of Bund policies. (R. 404.)

7. Finding No. XIV, R. 58, declaring that at, from and since his naturalization appellant's allegiance has been to Germany and not to the United States and his attachment to National Socialism rather than the principles of the Constitution is wholly erroneous.

There is not an iota of evidence in the record that appellant's allegiance since his naturalization has been to Germany or that his attachment has been to National Socialism.

8. Finding No. XV, R. 59, that the appellant was acquainted with the National Socialist character and

connection of the Bund as set out in the Bund findings and that he was in sympathy and agreement therewith is wholly erroneous.

There is no evidence in the record of appellant's individual trial from which any such findings could be made.

9. Finding No. XVI, R. 59, is erroneous in its entirety in declaring the appellant's oaths and statements in his naturalization proceeding were false and that he retained at said time a mental reservation of allegiance to Germany and that he did not give true and complete allegiance to the United States.

There is no evidence in the record from which any portion of said finding fairly could be made. On the contrary, the evidence is conclusive that the appellant was not guilty of any intrinsic or extrinsic fraud and that he abjured allegiance to Germany and then and there and ever since then has given full and true allegiance to the United States.

10. Conclusion of Law No. 1, R. 60, is erroneous in declaring the Court below had jurisdiction of the subject matter of the action.

That Court acquired no jurisdiction to set aside the final judgment of the Superior Court of California naturalizing the appellant. The conclusion is contrary to law.

11. Conclusion of Law No. II, R. 60, declaring the certificate of naturalization granted appellant was illegally and fraudulently procured by him and should

be revoked, set aside and cancelled is erroneous in its entirety.

This finding is contrary to the evidence and to law.

SUMMARY OF ARGUMENT.

The federal district Court below lacked jurisdiction to entertain the bill in equity to set aside the final naturalization judgment of a California state Court of record and the issues being *res judicata* the bill failed to state a cause of action. The failure of the plaintiff therein to have filed the affidavit showing good cause for filing the bill also deprived that Court of jurisdiction over the cause. The judgment below is erroneous because it was based upon evidence which failed to meet the requirements of the "clear, unequivocal and convincing" evidence rule. After the entry of the judgment below the Supreme Court decided, *Baumgartner v. U. S.*, 322 U. S. 655, which is controlling on the evidentiary issue on this appeal and requires a reversal of the judgment below.

ARGUMENT.

I.

THE DISTRICT COURT LACKED JURISDICTION OVER THE CAUSE FOR NON-COMPLIANCE WITH STATUTORY CONDITION PRECEDENT.

The complaint is defective and should have been dismissed because the U. S. district attorney failed

to file an "affidavit showing good cause" for the filing thereof, as required by Title 8 USCA, Section 738(a), as a condition precedent to the institution of the suit. There seems to be a conflict of authority in the circuits on this point. In *U. S. v. Saloman* (CCA-5), 231 Fed. 928, 929, a denaturalization suit was dismissed on the ground the affidavit was a mandatory jurisdictional prerequisite to the bringing of such a suit. In *Schwinn v. U. S.* (CCA-9), 112 Fed. (2d) 74, 75, this Court expressed an opinion that such an affidavit was "not jurisdictional." We submit that the condition is a mandatory condition precedent to the bringing of such a suit. In enacting the statute Congress acted within its legislative sphere and intended it to be a condition precedent. It is not to be presumed that Congress did not know what it was doing when it enacted the provision or that it intended that it was to have no meaning whatever. We suggest that Congress intended the ordinary import of the words set forth in the statute and contend that for the Courts to ignore the condition is an unwarranted interference with the legislative field forbidden by Article I of the Constitution.

II.

THE DISTRICT COURT LACKED JURISDICTION OVER THE CAUSE AND THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION COGNIZABLE THEREIN.

Original jurisdiction to naturalize aliens is conferred upon *Federal District Courts* and also upon

State Courts of record by the Nationality Act of 1940 (8 USCA, Sec. 701) and formerly by 8 USCA, Sec. 357. A State Court does not function as a Federal Court or as an agency of a Federal Court in naturalization proceedings. *In re Fordiani*, 98 Conn. 435, 120 A. 338, 339, 3 *Corpus Juris Sec.* 842, Sec. 134. In naturalization proceedings commenced in State Courts the adjective or procedural law of the State governs and that of the Federal jurisdiction has no application. See *Tutun v. U. S.*, 270 U.S. 568, and see also, *In re Bogunovich*, 18 Cal. (2d) 160, where this is recognized. Obviously, a proceeding in a Federal Court to set aside a final judgment of a State Court would constitute an impermissible Federal interference with the sovereignty of the State. See, *U. S. v. Gleason*, 78 Fed. 396.

In California the rule long has been settled that a final judgment of a California State Court cannot be subjected to attack for *intrinsic* fraud. See *Pico v. Cohn*, 91 Cal. 129, establishing the California rule. A judgment of a California Court which has become finalized is conclusive against attack except for *extrinsic* fraud, as established in that case. In consequence, the Federal Government could not move in a California Court to attack the final naturalization judgment herein except for *extrinsic* fraud and even to conduct such an attack it would have to sue as a plaintiff in a California Superior Court. Obviously Congress is not empowered to interfere with the conclusiveness of State judgments rendered by State Courts in matters of which they have jurisdiction. The Fed-

eral Government was a party to the hearing of the appellant's petition for citizenship in 1934 in the Superior Court at Oakland. It was an interested party represented by the naturalization examiner. That proceeding was an adversary one. The Federal Government did not take an appeal from that judgment and, in consequence, it not only became final but conclusive on the appellant and also on the Federal Government. Nothing in Title 8 USCA, Sec. 738, is to be construed as an attempt on the part of Congress to confer upon Federal Courts the power to nullify final naturalization judgments of State Courts of record. It has no power so to do. The State of California has not delegated any such authority to the United States and the 9th and 10th Amendments reserve such power to the States. No Court in the land appears to have declared that final naturalization judgments of State Courts can be set aside by attacks thereon instituted in a Federal forum.

The most that 8 USCA, Sec. 738 can be construed to authorize is (1) to enable the Federal Government to institute suits in Federal Courts to set aside Federal Court naturalization judgments either for intrinsic or extrinsic fraud and (2) to institute suits in State Courts, if not contrary to State law, to set aside State naturalization judgments if the State law authorizes attacks thereon either for intrinsic or extrinsic fraud. California State law, as decided by the Supreme Court of California, the highest judicial tribunal of the State, precludes attacks on its final judgments for intrinsic fraud but allows attacks for extrinsic fraud.

However, the complaint herein alleges a cause of action for intrinsic fraud, that is to say, it alleges the State naturalization judgment was obtained by perjury. In consequence, if it had been filed in a California Superior Court it would not have stated a cause of action. Inasmuch as it was filed in the U. S. District Court it not only fails to state a cause of action but exhibits an apparent want of jurisdiction in that Court over the cause on its very face.

III.

THE JUDGMENT IS ERRONEOUS BECAUSE IT IS BASED UPON EVIDENCE FAILING TO SATISFY THE CLEAR AND CONVINCING EVIDENCE RULE.

In direct attacks upon naturalization judgments brought by the United States for the jurisdictional reasons specified in 8 USCA, Sec. 738, Federal Courts may invalidate their own judgments either for extrinsic fraud, under the rule first laid down in *U. S. v. Throckmorton*, 98 U.S. 61, or for either intrinsic or extrinsic fraud, as specified by Title 8 USCA, Sec. 738. See *Knauer v. U.S.*, 328 U.S. 654, 671, so holding as to intrinsic fraud despite the fact that, so construed, the statute is an apparent Congressional interference with the conclusiveness of final judgments entered in the exercise of judicial power which is lodged exclusively in our Federal Courts by Article III of the Constitution.

The judgment of the Court below set aside the California judgment on a purported finding of intrinsic

sic fraud. However, there is nothing in the evidence that justifies the judgment of denaturalization. There is not the slightest evidence in the record that at the time of his naturalization in 1934 the appellant retained even a spark of allegiance to Germany. His activities and expressions since that time have not been incompatible with allegiance to the United States. An examination of the whole of the record reveals that the denaturalization judgment was based upon a belief that allowable facts and expressions of a harmless character long since his naturalization might impute such a mental reservation of foreign allegiance as at the time of naturalization. The judgment is erroneous for being contrary to the evidence and for being in violation of the "clear, unequivocal and convincing" evidence rule which, since the entry of the judgment below, has been clarified by the Supreme Court.

In *Schneidermann v. U. S.*, 320 U.S. 118, at 125, which was decided on June 21, 1943, the Supreme Court declared that in denaturalization cases the burden of proof rested upon the government to establish fraud or deceit in the procurement of naturalization by "Clear, unequivocal and convincing" evidence. See also the recent case of *Klapprott v. U.S.* (Jan. 17, 1949), 69 S. Ct. 384, 389, discussing that rule.

The judgment of the Court below in the instant case was entered on March 31, 1944, prior to the time the Supreme Court decided *Baumgartner v. U. S.*, 322 U.S. 655, on June 12, 1944, which clarified the law pertaining to the denaturalization cases, brought a rather abrupt halt to pending denaturalization cases

and is controlling on the evidentiary issues herein. At page 678 of its opinion that Court stated:

“But where the claim of ‘illegality’ really involves issues of belief or fraud, proof is treacherous and objective judgment, even by the most disciplined minds, precarious. That is why denaturalization on this score calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion argumentatively projected, and often through the distorting and self-deluding medium of memory, to an earlier year when qualifications for citizenship were claimed, tested and adjudicated.”

In *Knauer v. U. S.*, 328 U.S. 654, 659, 660, decided on June 10, 1946, that Court stated:

“The fundamental question is whether the new citizen still takes his orders from, or owes his allegiance to, a foreign chancellery. Far more is required to establish that fact than a showing that social and cultural ties remain. And even political utterances, which might be some evidence of a false oath if they clustered around the date of naturalization, are more and more unreliable as evidence of the perjurious falsity of the oath the further they are removed from the date of naturalization.”

In *U. S. v. Kusche* (DC Cal. June 13, 1944), 56 F. S. 201, which was followed by *U. S. v. Korner* (DC Cal. June 13, 1944), 56 F. S. 242, U. S. District Judge Pierson Hall dismissed twenty-six (26) suits similar to those in the like consolidated suits in the

Court below. The Attorney General did not appeal from those decisions.

Since the *Baumgartner* decision the following cases have been decided against the contentions of the Government in denaturalization cases on the authority of that decision, viz.:

U. S. v. Reinsche (CCA-9, March 12, 1945), 156 Fed. (2d) 678;

U. S. v. Hauck (CCA-2, April 2, 1946), 155 Fed. (2d) 141;

Scheurer v. U. S. (CCA-9, June 16, 1945), 150 Fed. (2d) 535;

Bergmann v. U. S. (CCA-9, June 24, 1944), 144 Fed. (2d) 34;

U. S. v. Sotzek (CCA-2, Aug. 15, 1944), 144 Fed. (2d) 567.

See also:

Jogwick v. U. S. (CCA-4, May 25, 1944), 142 Fed. (2d) 998.

We believe these decisions to be decisive on the evidentiary issues herein.

Any fair appraisal of the evidence herein demonstrates that the judgment of denaturalization was not supported by the evidence and that, on the contrary, the plaintiff failed to sustain its burden of proof of a mental reservation of foreign allegiance at the time of naturalization by "clear, unequivocal and convincing" evidence. Had the *Baumgartner* decision been handed down before the Court below rendered its judgment there is little doubt that the appellant would have prevailed in the proceeding below.

CONCLUSION.

For the foregoing reasons we urge that the judgment of the Court below be reversed.

Dated, San Francisco, California,
February 28, 1949.

Respectfully submitted,

WAYNE M. COLLINS,

Attorney for Appellant,

No. 12,093

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHANNES FREDERICK BECHTEL,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF FOR APPELLEE.

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No. 12,093

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHANNES FREDERICK BECHTEL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is one of seven denaturalization cases involving members of the German-American Bund which were tried in the United States District Court for the Northern District of California and in which the Government obtained judgment against all of the defendants.

The cases were consolidated (*United States v. Bruno Holtz, et al.*, 43 F.Supp. 63) for the trial of the common issues of law and fact as to the un-American and subversive character of the German-American Bund and predecessor organizations, of which all of the defendants were members, reserving to the individual defendants separate trials as to their

separate and individual statements, acts, conduct and membership in, knowledge of the principles and purposes of the German-American Bund and its predecessor organizations and their personal participation in the activities of said organizations, together with their personal endorsement of such principles, aims and activities.

FINDINGS AND CONCLUSIONS AS TO THE COMMON ISSUE.

After hearing lengthy testimony with respect to the principles, purposes and activities of the German-American Bund and its predecessor organizations, the Court below prepared findings of fact and conclusions of law as to the common issue, which are set forth herein in full in the appendix.

The conclusions of law of the Court below were succinct and to the point and are well worthy of repetition. They are as follows:

- “(1) In carrying out the activities hereinabove described, and in seeking to accomplish its real aims and purposes, the Bund demonstrated itself to be a German Militant ‘Fifth Column’ organization in the United States, antagonistic to the democratic form of government and to the Constitution and laws of the United States, un-American and subversive. One who believes in the National Socialist philosophy and form of government cannot at the same time be loyal to the United States nor attached to the principles of the Constitution and laws of the United States.
- (2) The principles of German National Social-

ism are opposed in all respects to the principles of democracy and to the Constitution and laws of the United States.”

APPELLANT'S INDIVIDUAL TRIAL.

Appellant Johannes Frederick Bechtel testified that he was born in Landshup County, Germany, in 1900; that he completed grade school and a practical course in gardening; that he was in the German army from July to December, 1918, and that he never filled any official position under the German or any other government. (R. 105-6.) He migrated to the United States in September, 1925, and had never subsequently returned to Germany. He filed his declaration of intention to become a citizen of the United States in 1927, his petition for naturalization on November 22, 1933, and was naturalized in the Superior Court, Alameda County, on February 23, 1934. (R. 161-162, 364.)

Appellant's wife migrated to the United States in 1923. They were married in 1928 and she has never become a citizen of the United States. (R. 172.)

During the course of the consolidated trial, certain witnesses testified concerning the appellant Bechtel, as follows:

Leopold Peterknecht testified from his membership card (U. S. Ex. 217, consolidated case) that he joined the Friends of New Germany at the time the San Francisco unit was organized in November, 1933. (R.

94, consolidated trial, pages 560-561.) He identified appellant Bechtel as a member of the Bund and the O. D. (Ordnungs Dienst) from "the beginning." (R. 94, consolidated trial, p. 570.)

Witness William J. Punjer testified that he saw appellant Bechtel attending Bund meetings in 1937 or 1938. (R. 94, consolidated trial, p. 730.)

Witness Eloise Gast Atkins (in consolidated trial) identified herself as a former hat check girl at the German Pioneer House in Oakland (consolidated trial, p. 586) and testified that between 1933 and 1939 appellant Bechtel regularly attended Bund meetings there wearing the Bund uniform. (R. 95, consolidated trial, p. 593.)

Witness Severin Winterscheidt identified himself as a former member of the editorial staff of the Bund newspaper. (Consolidated trial, p. 214). He identified a file of copies of that newspaper (consolidated trial, U. S. Ex. 55) item 156 of which dated June 30, 1938, referring to the recent Bund celebration at Dublin Canyon, expresses thanks to "Bund member Bechtel for his tireless work in keeping the swastika burning on the mountain slope as long as possible." (R. 96.)

Government witnesses in the appellant's individual trial, testified as follows:

The deposition of Andreas Peter Jessen was read in evidence. From it, it appears that Jessen first met appellant in 1936, at the time the Concord unit of the Bund was organized. (R. 97.) Witness' deposi-

tion further stated that the appellant came to Concord from Oakland in an automobile with Gottfried Hein, Oakland unit leader, along with four other carloads of Bund members and assisted in organizing the Concord unit (R. 108); that witness subsequently saw appellant at Bund meetings in Oakland and at the Bund celebration at Dublin Canyon; that he had seen appellant in the O. D. uniform, attending Bund and O. D. meetings (R. 102) and that appellant attended the Dublin Canyon celebration in the O. D. uniform (R. 103). Witness' deposition further shows that he had seen appellant in the Bund uniform at an O. D. meeting in Oakland in 1936, along with 23 or 24 other members. (R. 104.)

Government witness Eldon J. Edwards testified that he had been acquainted with appellant since 1934 or 1935 (R. 153); that about 1938, appellant stated the Versailles Treaty and the Jews were the cause of all the trouble in Germany and that he was in favor of the German territorial expansion program "to a certain extent." (R. 154.)

Jeanne Eloise Atkins (identical with Eloise Gast Atkins, referred to in the consolidated trial) testified that she had been hat check girl at the German Pioneer House in Oakland from 1934 to 1938 (R. 189); that she saw appellant Bechtel attending at least 25 Bund meetings during those years, and in the Bund uniform at least one-half of that time; that on an occasion during the early part of 1938, when Herman Schwinn delivered a speech, appellant Bechtel carrying the swastika flag, entered the meeting room with

a procession of Bund members (R. 196). The witness testified that she was not a Bund member herself and never attended the Bund meetings, but saw appellant Bechtel entering the meetings, and often saw him through the window participating in the meetings. (R. 192.)

Witness Rudolf Joseph Schall identified himself as a landscape gardener and an acquaintance of appellant for 10 or 12 years. (R. 199-200.) He testified that appellant frequently stated to him that economic conditions in Germany were excellent and that Germany was justified in attacking Poland. (R. 201.)

Witness Robert Bach testified that he had been acquainted with appellant since 1934; that appellant had stated to him that conditions were better in Germany under Hitler and that the Jews in Germany should be deported to a separate country by themselves. (R. 217-218.) Witness attended the Bechtels' wedding anniversary and saw a large swastika about 3 or 4 feet long on the ceiling there. (R. 216-217.)

Witness Carl W. Bolle testified that he met appellant in 1927 (R. 224); that about 1937 or 1938 appellant began to talk about Hitler and Germany when they were together; that appellant approved of Hitler's program in Germany. (R. 227-229.)

Witness Guenther E. Reinecke testified that he had been a neighbor and acquaintance of appellant since 1926 (R. 249); that appellant in the Bund uniform attended a banquet at the Hotel Oakland in 1935 in honor of the officers and crew of the visiting German

battleship "Karlsruhe," and that about 1934 appellant began to talk about the building program and the good economic conditions in Germany. (R. 250-1-2.)

Witness Henry Koenig testified that he had been acquainted with appellant between 5 and 10 years. (R. 256.) *Witness stated that appellant approved of the Nazi program*, but testified that he had never said that Bechtel told him that the "new order" should be established in the United States. (R. 261-262.) Federal Bureau of Investigation Agent Edward W. Butler testified that witness Koenig had made a sworn statement to him during the first part of 1943, and after reading the statement had initialed certain corrections and thereafter signed same as correct. The statement was introduced in evidence as U. S. Ex. 4 and a portion read into the record as follows:

"I have known Hans Bechtel socially for the past ten or twelve years. About 1935 or 1936 Hans began to talk about the conditions in Germany. He would tell about how much better things were in Germany under the new order there. He complained about poor conditions in the United States and would say things would be better in the United States if the new order was in the United States. Hans approved of the Nazi program. He thought the proper way to do things was the way they were done in Germany." (R. 261.)

Witness Koenig thereafter disclaimed stating that appellant favored the establishment of the "new order" here.

Witness Albert W. Kruse testified that he had been acquainted with appellant since 1933 or 1934; that he had seen him in Bund uniform on two occasions, once in Oakland in 1935 at the celebration in honor of the officers and crew of the German battleship "Karlsruhe" and again in 1937 at a Christmas party given by the Bund at which Gottfried Hein spoke, outlining the general conditions of the youth movement in Germany, and requesting the members and their friends to support a German language and culture school here; that after this speech the appellant requested witness to send his son to that school (R. 267-268); that on or about 1933 or 1934 appellant remarked to the witness that the German people were better off under the Hitler regime than the people were in the United States; that about 1938 or 1939 appellant stated that he would like to "liquidate his property" and return to Germany (R. 270), and that on several occasions appellant tendered to witness to read some German newspaper published in the United States (R. 271).

Witness Arthur Cobbledick testified that appellant was employed as a gardener by his father from 1925 to 1927, and employed by the witness in a similar capacity from 1927 to 1932, and that he had seen appellant about six times since 1932 at which they had any conversation. (R. 274.) On those occasions appellant stated that "the Nazis were more successful in meeting their problems of unemployment than our own Government was at the same time" (R. 275) and

that the troubles in Germany were caused by the Jews there (R. 276).

Witness Edna Bell Holman testified that she became acquainted with the appellant 18 or 19 years ago when he was employed as a gardener by her father, and later by her husband (R. 278); that soon after Hitler came into power in Germany appellant stated to witness that he approved of Hitler's program (R. 279) and that the Jews in this country should be treated as they were in Germany (R. 280); that in 1939 or 1940 appellant garbed in the Bund uniform brought his daughter to witness' home to be left there while he attended a Bund function; that appellant stated that they were saving their money in order to go back to Germany (R. 282), and that after she was subpoenaed as a witness in this case, appellant came to her home to see her (R. 284). Witness further testified that appellant told her that he approved of Hitler's national and international policy in 1941, just prior to the entrance of the United States in the war (R. 285-288); that in 1939 appellant stated that he contemplated making a trip to Germany (R. 289) and that they would remain there if it were practicable (R. 290).

Appellant Bechtel testified that he first heard of the Friends of New Germany in July or August of 1934, and joined about September, 1934 (R. 107); that he signed a regular membership application blank when he joined and duly received his membership card

(R. 108). He remained a member of the Bund until October, 1938 (R. 111), and that during the *first week in 1939 he had a fight with unit leader Hein and resigned from the Bund*, but continued to attend meetings and Bund forums thereafter (R. 122-123).

Bechtel testified that at the time he joined the Bund he did not know that its membership was limited to persons of Aryan blood (R. 116), but did know it was governed by the leadership principle (R. 118).

Appellant further testified that he was familiar with the activities of the F. D. N. D. and the Bund from 1934 until 1939 (R. 123); that he had heard speeches delivered by Herman Schwinn, Fritz Kuhn (R. 124, 125, 126, 127), Henry Lage and Gottfried Karl Hein, all Bund unit leaders (R. 131), but immediately thereafter testified that he had never heard the Nazi blood theory nor the question of lebensraum discussed; that the principles and political theories of the German Government were never mentioned; that only the better economic conditions there were discussed (R. 127-128). Appellant saw many of the German travel films which were shown at Bund meetings. (R. 129.)

Appellant testified that he never believed that National Socialism was a better form of government than democracy, and never heard any speeches to that effect in the Bund, that at the Bund meetings the hall was decorated with swastika and American flags, but he did not recall seeing any banners with the Bund slogan displayed. (R. 134-135.)

Appellant identified himself in a group picture with other Bund members (U. S. Ex. 2, R. 136-139-140), taken at the German Pioneer House in Oakland in 1937, and testified that occasionally the members sang the Horst Wessel song at the meetings, but never "Deutschland uber Alles" (R. 137), and that they usually gave the greeting "Heil" or "Seig Heil" (R. 137-139).

Appellant testified that when the German battleship "Karlsruhe" visited San Francisco in 1935, appellant, together with other Bund members, dressed in their O. D. uniforms and attended a reception for them in the Hotel Oakland. (R. 137.)

Appellant further testified that at the Bund meetings there were always Bund and German literature, magazines and periodicals, including "Mein Kampf," the Bund year book and "Der Schulungsbriefe" (R. 143-146), available for the use of members, some of which he read; that he subscribed to the Bund newspaper during the year 1939.

Appellant testified that when he resigned from the Bund in 1939, he burned up his uniform. (R. 149.)

Appellant, together with other Bund members, attended a Bund convention in Fresno, California, in 1935. (R. 149-150.)

Appellant identified in the year book of the F. D. N. D. (U. S. Ex. 15) a photograph of the review of the O. D. taken in Fresno in July, 1935, at the convention, but did not remember whether he ever possessed a copy of the year book or not. (R. 151-162.)

He testified that in the Bund they honored the American and German flags equally. (R. 170-171.)

Appellant testified that his wife repeatedly attempted to persuade him to leave the Bund because some of her friends objected to it. (R. 173.)

Appellant testified that he attended one Bund meeting in 1939 or 1940, at which a member of the Silver Shirt organization spoke and that some of its literature was available for distribution and that he bought some of it, but that he never attended any of the Hitler birthday celebrations of the Bund. (R. 176.)

Appellant testified that at his tenth wedding anniversary in April, 1938, to which he invited a number of his Bund member friends, a large swastika was fastened on the ceiling in his home. (R. 176-177-178.)

WITNESSES CALLED IN APPELLANT'S BEHALF.

These witnesses testified in general that the appellant's reputation in the community was for truth, honesty and integrity. Otherwise their testimony was of a negative character. Exception may be made in the case of Phil S. Gibson, who testified that appellant told him that he had been a member of the Bund from 1934 until about 1938 or 1939, and that on appellant's tenth wedding anniversary celebration the appellant had a large swastika on the ceiling in his house. (R. 309-310.)

Appellant's witness Lou Mitchell Young testified that on May 31, 1941, before she knew that any proceedings had been commenced against appellant, she

went to the local office of the Federal Bureau of Investigation in San Francisco, and told them that appellant, who was then employed by her, was speaking about Hitler; that she thought he was talking too frequently about Hitler and Germany and reported him in order to protect him. (R. 317-318.)

THE ISSUES.

The appellant states in his brief that the questions involved are as follows (Br. p. 4):

- (1) Can a final naturalization judgment rendered by a State Court of competent jurisdiction be nullified by an attack launched in a Federal Court?
- (2) Can a denaturalization judgment be justified by the imputation of a mental reservation of foreign allegiance at the time of naturalization, *nunc pro tunc*, when the mental reservation rests upon evidence which failed to meet the requirements of the "clear, unequivocal and convincing evidence" rule?

However, in his argument he seems to raise the following questions (Br. 28, 29, 32):

- (1) The District Court lacked jurisdiction over the cause for noncompliance with the statutory condition precedent.
- (2) The District Court lacked jurisdiction over the cause and the complaint fails to state a cause of action cognizable therein.
- (3) The judgment is erroneous because it is based on evidence failing to satisfy the clear and convincing evidence rule.

In the last analysis the real issue raised by appellant is that the evidence in this case does not meet the degree of proof required in a denaturalization proceeding. All other contentions are subordinate to this issue.

In that connection due consideration must be given the opinions in the Supreme Court in the cases of *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333; 87 L.Ed. 1796, rehearing denied 64 S.Ct. 24, 320 U.S. 807, 88 L.Ed. 488; *Baumgartner v. United States*, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525; *Knauer v. United States*, 328 U.S. 654, 66 S.Ct. 1304, 90 L.Ed. 1195;

and the recent case of

Kuehn v. United States, 54 F.Supp. 63, 162 F. (2d) 716; cert. denied 332 U.S. 837.

It will be noted that the Supreme Court distinguished the case of *Knauer v. United States*, supra, from the cases of *Schneiderman v. United States*, supra, and *Baumgartner v. United States*, supra. It will be further noted that the decision in the case of *Kuehn v. United States*, supra, in the Ninth Circuit, follows the decision in *Knauer v. United States*.

It is the contention of the Government that there is ample evidence to sustain the findings of the District Court. The Court made certain findings as to the aims, purposes and doctrines of the German-American Bund and its predecessor organizations. These are fully set forth in the appendix to this brief.

In its Conclusions of Law based on the Findings of Fact, the Court found that in carrying out the activities set forth in its Findings of Fact (see appendix) and in seeking to accomplish its real aims and purposes, the Bund demonstrated itself to be a German militant "Fifth Column" organization in the United States, antagonistic to the democratic form of government and to the Constitution and laws of the United States, un-American and subversive. The Court held that one who believed in the National Socialist philosophy and form of government, cannot at the same time be loyal to the United States nor attached to the principles of the Constitution and laws of the United States. In addition thereto, the Court made certain specific findings of fact as to appellant's individual case, which findings are set forth in the appendix.

ARGUMENT.

Appellee concedes that in a denaturalization proceeding the burden is on the Government to prove its case by clear, unequivocal and convincing evidence. The appellee contends, however, that under the decision of the United States Supreme Court in the case of

Knauer v. United States, 328 U.S. 654, 66 S.Ct. 1304, 90 L.Ed. 1195,

and the decision of this Court in the case of

Kuehn v. United States (decided July 28, 1947), 162 F.(2d) 716; rehearing denied August 25, 1947; certiorari denied December 8, 1947, 332 U.S. 837,

the appellee has met the test of establishing his case by clear, unequivocal and convincing evidence that said appellant procured the issuance of a certificate of naturalization by fraud.

Let us start with the premise that the granting of citizenship through the process of naturalization is a privilege and not a right. In the case of

Johannessen v. United States, 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066,

at page 240, the Court quoted from the case of *United States v. Spohrer*, 175 Fed. Rep. 440. The language used by Judge Cross in that case regarding the right of an alien to naturalization, is as follows:

“An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not, he takes nothing by his paper grant. Fraud cannot be substituted for facts.”

And again, on page 446,

“That the government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is, in my judgment, well settled, and if

that be true of property, then by analogy and with greater reason it would seem to be true where it has conferred a privilege in answer to the prayer of an ex parte petitioner.”

The Supreme Court makes a distinction between the measure of proof that is necessary to deny a petition for citizenship under Section 4 of the Act of June 29, 1906 (36 Stat. 598) and the degree of proof necessary to cancel a citizenship for fraud under Section 338 (a) of the Nationality Act of 1940.

In the first class of cases the Court placed on the petitioner for citizenship the burden of proving his eligibility therefor. In the second class of cases, the cancelling of a certificate of citizenship secured by fraud placed the burden on the Government.

Schneiderman v. United States, supra;

Baumgartner v. United States, supra;

Klapprott v. United States (decided January 17, 1949, and reported Supreme Court Law Ed. advance opinion 279).

The courts have uniformly held that an alien fraudulently naturalized, should not be permitted to retain the fruit of his fraud, and will cancel a certificate of naturalization fraudulently obtained.

In *Johannessen v. United States*, supra, the Court said, at page 241:

“An alien has no moral or constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the Court, without which the certificate

of citizenship could not and would not have been issued. As was well said by Chief Justice Parker in *Foster v. Essex Bank*, 16 Mass. 245, 273, 'there is no such thing as a vested right to do wrong.' "

In

Luria v. United States, 231 U.S. 9, 34 S.Ct. 10,
58 L.Ed. 101,

at page 24, the Court quoting from *Johannessen v. United States*, *supra*, said:

"Several contentions questioning the constitutional validity of Section 15 are advanced, but all, save the one next to be mentioned, are sufficiently answered by observing that the section makes no discrimination between the rights of naturalized and native citizens, and does not in any wise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled."

U. S. v. Ginsberg, 243 U.S. 472, 37 S.Ct. 422,
61 L.Ed. 853;

Tutun v. United States, 270 U.S. 568, 46 S.Ct. 425, 70 L.Ed. 738;

United States v. Ness, 245 U.S. 319, 8 S.Ct. 118,
62 L.Ed. 321.

Constitutional rights are not endangered by the provision authorizing cancellation of certificate of one taking up a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship.

Luria v. U. S. (N. Y. 1913), 34 S.Ct. 10, 231 U.S. 9, 58 L.Ed. 101, affirming *U. S. v. Luria* (D. C. 1911) 184 Fed. 643;

Section 338 of the Nationality Act of 1940; Title 1, subchapter III, 54 Stat. 1158, Title 8 U.S.C.A. Sec. 738.

This section authorizing the revocation of a certificate of naturalization procured by fraud is constitutional, whether fraud be intrinsic or extrinsic.

U. S. v. Siegel (Conn. 1945), 59 F.Supp. 183, 152 F. (2d) 614; cert. denied, 66 S. Ct. 1361, 328 U.S. 868, 90 L.Ed. 1264.

This same section authorizing the revocation of a certificate of naturalization on the ground that it was illegally procured, does not constitute legislative usurpation of judicial power.

U. S. v. Gallucci (D.C. Mass. 1944), 54 F.Supp. 964.

The provision for the cancellation of certificates of citizenship under the Act of June 29, 1906, applied not only to certificates issued then, but to all certificates heretofore issued by Court exercising jurisdiction in naturalization proceedings.

In its opinion in the case of

Schneiderman v. United States, supra, the Supreme Court began using the words "clear, unequivocal and convincing" as to the degree of proof required for the cancellation of a certificate of naturalization procured by fraud. It was the first case in that Court wherein it was called upon to decide what evidence was necessary to sustain the cancellation of a certificate of naturalization on the ground that at the time of taking his oath of allegiance to the United States, the naturalized alien had made a mental reservation of an allegiance to another sovereign. The Court endeavored in this case to determine the state of mind of the petitioner for certiorari at the time of his taking the oath of allegiance to citizenship of this country, and decided that in such cases the degree of proof would have to be of a nature which it indicated, "clear, unequivocal and convincing." The Court failed to make definite what it regarded as meeting this degree of proof in particular cases.

This case was followed in that Court by that of *Baumgartner v. United States*, supra, wherein the Court reiterated that the degree of proof necessary for the cancellation of a certificate of naturalization under Section 338(a) of the Nationality Act of 1940 was that such proof must be clear, unequivocal and convincing. In this case the Court was also called upon to pass upon the state of mind of the petitioner for certiorari, Baumgartner, at the time of his naturalization. The Court, in commenting on the state of mind of petitioner at the time he took the oath of allegiance, stated (page 677):

“In short, the weakness of the proof as to Baumgartner’s state of mind at the time he took the oath of allegiance can be removed, if at all, only by a presumption that disqualifying views expressed *after naturalization* were accurate representations of his views when he took the oath. The logical validity of such a presumption is at best dubious even were the supporting evidence less rhetorical and more conclusive. Baumgartner was certainly not shown to have been a party Nazi, and *there is only the statement of one witness that Baumgartner had told him that he was a member of the Bund, to hint even remotely that Baumgartner was associated with any group for the systematic agitation of Nazi views or views hostile to this government.* On the contrary Baumgartner’s diary, on which the Government mainly relies reveals that when in 1939 he attended a meeting of the German Vocational League at which the Nazi salute was given, it was apparently his only experience with this group, and he went ‘Since I wanted to see what sort of an organization this Vocational League was,’ ”

and on page 676, the Court said:

“The insufficiency of the evidence to show that Baumgartner did not renounce his allegiance to Germany in 1932 need not be labored. Whatever German political leanings Baumgartner had in 1932, they were Hitler and Hitlerism, certainly not to Weimar Republic. Hitler did not come to power until after Baumgartner forswore his allegiance to the then German nation.”

Owing to the uncertainty as to what constituted this degree of proof the Supreme Court granted a writ

of certiorari to the Circuit Court of Appeals for the Seventh Circuit in the case of

Knauer v. United States, 328 U.S. 654, 90 L.Ed. 1195.

In this case the District Court had cancelled a certificate of naturalization and revoked the order admitting Knauer to citizenship on the ground that same had been procured by fraud. The Circuit Court of Appeals for the Seventh Circuit affirmed this opinion. (149 F.(2d) 519.) The Supreme Court granted certiorari.

The facts in this case were as follows: Knauer was a native of Germany. He arrived in this country in 1925 at the age of 30. He had served in the German army during World War I and was decorated. He had studied law and economics in Germany. He settled in Milwaukee, Wisconsin, and conducted an insurance business there. He filed his declaration of intention to become a citizen in 1929 and his petition for naturalization in 1936. He took his oath of allegiance and was admitted to citizenship on April 13, 1937. In 1943 the United States instituted proceedings under Section 338(a) of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U.S.C. Sec. 738(a), to cancel his certificate of naturalization on the ground that (1) he had falsely and fraudulently represented in his petition that he was attached to the principles of the Constitution and (2) that he had taken a false oath of allegiance. The District Court was satisfied that Knauer practiced fraud when he obtained his certificate of naturalization. It found that he had not been and was not attached to the principles of the Con-

stitution and that he took a false oath of allegiance. It accordingly entered an order cancelling his certificate and revoking the order admitting him to citizenship.

The Circuit Court of Appeals affirmed the lower court (149 F.(2d) 519). The case was before the United States Supreme Court on a petition for writ of certiorari which was granted to examine that ruling in the light of the decisions of that Court in

Schneiderman v. United States, 320 U.S. 118,

and

Baumgartner v. United States, 322 U.S. 655.

In the oath of allegiance which Knauer took, he swore that he would "absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to the German Reich"; that he would "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic"; that he would "bear true faith and allegiance to the same" and that he took "this obligation freely without any mental reservation or purpose of evasion." The first and crucial issue in the case was whether Knauer swore falsely and committed a fraud when he promised under oath of forswear allegiance to the German Reich and to transfer his allegiance to this nation.

The Supreme Court examined the facts to determine whether the United States had carried its burden of proving by "clear, unequivocal and convincing" evidence, which does not leave the issue in doubt, that

the citizen who is sought to be restored to the status of an alien obtained his naturalization illegally.

The Court endeavored to discover the state of mind of Knauer *at the time he swore falsely* on April 13, 1937, the date he took the oath of allegiance to the United States. The Court stated that as in the *Baumgartner* case utterances made in years subsequent to the oath, are not readily to be charged against the state of mind existing when the oath was administered. (322 U.S. 675.) Troubled times and the emotions of the hour may elicit expressions of sympathy for old acquaintances and relatives across the waters. "Forswearing past political allegiance without reservation and full assumption of the obligations of American citizenship are not at all inconsistent with cultural feelings imbedded in childhood and youth." (*Baumgartner v. U.S.*, *supra*, p. 674.)

Human ties are not easily broken. Old social and cultural loyalties may still exist, though basic allegiance is transferred here. The fundamental question is whether the new citizen still takes orders from or owes his allegiance to a foreign chancellory. Far more is required to establish that fact than a showing that social and cultural ties remain. And even political utterances, which might be some evidence of a false oath, if they cluster around the date of naturalization, are more and more unreliable as evidence of the perjurious falsity of the oath the further they are removed from the date of naturalization.

Both the District Court and the Circuit Court of Appeals accepted as the true version of the facts, the following:

As early as 1931, Knauer told a newly arrived immigrant who came from the same town in Germany that, in his opinion, the aim of Hitler and the Nazi party was good, that it would progress, and that it was necessary to have the same party in this country because of the Jews and the Communists. During the same period he told another friend repeatedly that he was opposed to any republican form of government and that Jewish capital was to blame for Germany's downfall. He visited Germany for about six months in 1934 and while there read Hitler's "Mein Kampf." On his return he said, with pride, that he had met Hitler and that he had been offered a post with the German Government at 600 marks per month; that Hitler was the savior of Germany, that Hitler was solving the unemployment problem while this country was suffering from Jewish capitalism; that the Hitler youth organization was an excellent influence on the children of Germany. On occasions in 1936 and 1937, he was explosive in his criticism of those who protested against the practices and policies of Hitler.

The German Winter Relief Fund was an official agency of the German Government for which German consulates solicited money in the United States. In the winter of 1934-1935, Knauer was active in obtaining contributions to the fund and forwarded the money collected to the German consulate in Chicago.

The German-American Bund had a branch in Milwaukee. Its leader was George Froboese, midwestern gauleiter and later national leader. The Bund taught and advocated the Nazi philosophy, the leadership principle, racial superiority of the Germans, the principle of the totalitarian state, Pan-Germanism and of Lebensraum (living space). It looked forward to the day when the Nazi form of government would supplant our form of government. It emphasized that allegiance and devotion to Hitler were superior to any obligation to the United States. Knauer denied that he was a member of the Bund, but the District Court found to the contrary on evidence which was solid and convincing.

Knauer participated in Bund meetings in 1936. In the summer of 1936 he and his family had a tent at the Bund camp. In the fall of 1936 he enrolled his young daughter in the Youth Movement of the Bund, a group organized to instill the Nazi ideology in the minds of children of German blood. They wore uniforms, used the Nazi salute, and were taught songs of allegiance to Hitler. Knauer attended meetings of this group.

The Federation of German-American Societies represented numerous affiliated organizations composed of persons of German descent and sought to coordinate their work. It was the policy of the Bund to infiltrate older German societies. This effort was made as respects the federation. Knauer assisted Froboese and others between 1933 and 1936 in endeavoring to have the swastika displayed at celebrations of

the federation. In 1935, Knauer reprimanded a delegate to the federation for passing out pamphlets opposing the Nazi Government in Germany. At a meeting of the federation in 1935, Knauer moved to have the federation recognize the swastika as the flag of the German Reich. The motion failed to carry. In 1936 the swastika flag was raised at a German day celebration without approval of the federation. A commotion ensued in which Bundists in uniform participated, as a result of which the swastika flag was torn down. At the next meeting of the federation Knauer proposed a vote indicating approval of the showing of the swastika flag. The motion failed and a vote of censure of the chairman was passed. The chairman resigned. Thereupon Froboese and others proposed the formation of the German-American Citizens Alliance to compete with the federation. It was organized early in 1937. The constitution and articles of incorporation of the alliance provided that all of its assets on dissolution were to become the property of a German Government agency for the dissemination of propaganda in foreign countries, the Deutsches Auslands-Institut. The alliance was a front organization for the Bund. It was designed to bring into its ranks persons who were sympathetic with the objectives of the Bund but who did not wish to be known as Bund members.

On February 22, 1937, *less than two months before Knauer took his oath of naturalization*, he was admitted to membership in the alliance and became a member of its executive committee. His first action

as a member was to volunteer the collection of newspaper articles that attacked the alliance, Germany and German-Americans. In 1937, and in the ensuing years Knauer wrote many letters and telegrams to those who criticized the Bund or the German Government. In 1938 Knauer was elected vice-president of the alliance and subsequently presided over most of its meetings. He was the dominant figure in the alliance. In May, 1937, the German consul presented to the alliance the swastika flag which had been torn down at the federation celebration the year before. Not long after his naturalization Knauer urged that the alliance sponsor a solstice ceremony, a solemn rite at which a wooden swastika was burned to symbolize the unity of the German people everywhere. In August, 1937, the alliance refused to participate in an affair sponsored by a group which would not fly the swastika flag. In May, 1938, Knauer at a meeting of the alliance read a leaflet entitled "America, the Garbage Can of the World". In 1939 he arranged for public showings of films distributed by an official German propaganda agency and depicting the glories of Nazism.

There was an intimate cooperation between the alliance and the Bund. The Bund camp was used for alliance affairs and it was available to alliance members. The alliance supported various Bund programs. It supported the Youth Group of the Bund and the Bund's solstice celebration. In 1939 the Youth Group of the Bund held a benefit performance for the alliance. In 1940 it admitted the Youth Group of the Bund at

the request of Forboese. Knauer consistently defended the Bund when it was criticized, when it was denied the use of a park or hall, when its members were arrested or charged with offenses. In spite of the fact that Knauer knew the real aims and purposes of the Bund and was aware of its connection and Froboese's connection with the German Government, he consistently came to its defense. Thus, when a Wisconsin judge freed disturbers of a Bund meeting, he wrote the judge saying that the judge's remarks against the Bund were a "slander of a patriotic American organization." He subscribed to the official Bund newspaper and to a propaganda magazine issued and circulated by an agency of the German Government. He held shares in the holding company of the Bund camp which was started in 1939. A photograph taken at the dedication of the new Bund camp in 1939 shows Knauer among a group of prominent Bund leaders with arm upraised in the Nazi salute. He owned a cottage at the Bund camp. He used the Nazi salute at the beginning and end of his speeches and at the Bund meetings.

In May, 1938, Knauer and Froboese formed the American Protective League with a secret list of members. Knauer was elected a director. A constitution and by-laws were adopted and copies mailed by Knauer and Froboese to Hitler. One Buerk was a German agent operating in this country and later indicted for failing to register as such. In 1939 the German consulate in Chicago supervised the recruiting of skilled workers in that region for return to

Germany for work in German industries. The German consul, Buerk, Froboese and Knauer conducted the recruiting. Knauer participated actively in interviewing candidates. At intervals farewell parties were given by Knauer and Froboese to the returning workers and their families.

Important evidence implicating Knauer in promoting the cause of Hitler in this country was given by a Mrs. Merton. She testified that, prompted solely by patriotic motives, she entered the employ of Froboese in 1938 in order to obtain evidence against the Bund and its membership. The truth of her testimony was vigorously denied by Knauer. But the District Court believed her version as did the Circuit Court of Appeals. The Court felt that her testimony was strongly corroborated and that Knauer's attempt to discredit her testimony did not ring true.

Her testimony may be summarized as follows:

She acted as secretary to Froboese in 1938. During the period of her employment Froboese and Knauer worked closely together on Bund matters. He helped Froboese in the preparation of articles for the Bund newspaper, of speeches, and of Bund correspondence. He helped Froboese prepare resolutions to be offered at the 1938 Bund convention calling for white-gentile-ruled America. When Froboese left the city to attend the convention, he told her to contact Knauer for advice concerning Bund matters. Letters signed by Froboese and Knauer jointly were sent to Hitler and other Nazi officials. One contained a list of 700 German nationals. One was the constitution and by-laws

of the American Protective League which we have already mentioned. One to Hess said they had to lay low for awhile, that there was an investigation on. A birthday greeting to Hitler from Froboese and Knauer closed with the phrase, "In blind obedience we follow you." Knauer told her never to reveal that the alliance and the Bund were linked together. One day she asked Knauer what the Bund was. His reply was that the Bund "was the Fuehrer's grip on American democracy." She reminded Knauer that he was an American citizen. He replied, "That is a good thing to hide behind."

On page 668 of the opinion in the *Knauer* case, the Court made the following statement:

"Moreover, the case against Knauer is not constructed solely from his activities subsequent to April 13, 1937—the date of his naturalization. The evidence prior to his naturalization, that which clusters around that date, and that which follows in the next few years is completely consistent. It conforms to the same pattern. We do not have to guess whether subsequent to naturalization he had a change of heart and threw himself wholeheartedly into a new cause. We have clear, convincing and solid evidence that at all relevant times he was a thoroughgoing Nazi bent on sponsoring Hitler's cause here. And this case, unlike the Baumgartner case, is not complicated by the fact that when the alien took his oath Hitler was not in power. On April 13, 1937, Hitler was in full command. The evidence is most convincing that at that time, as well as later, Knauer's loyalty ran to him, not to this country."

On page 669 of its opinion, the Court distinctly set forth that its view in this case was different than the *Schneiderman* and *Baumgartner* cases. The Court said:

“The district Court properly ruled that membership in the Bund was not in itself sufficient to prove fraud which would warrant revocation of a decree of naturalization. Otherwise, guilt would rest on implication, contrary to the rule of the *Schneiderman* and *Baumgartner* cases. But we have here much more than that. We have a clear course of conduct, of which membership in the Bund was a manifestation, designed to promote the Nazi cause in this country. This is not a case of an underling caught up in the enthusiasm of a movement, driven by ties of blood and old associations to extreme attitudes, and perhaps unaware of the conflict of allegiance implicit in his actions. Knauer is an astute person. He is a leader—the dominating figure in the cause he sponsored, a leading voice in the councils of the Bund, the spokesman in the program for systematic agitation of Nazi views. His activities portray a shrewd, calculating and vigilant promotion of an alien cause. The conclusion seems to us plain that when Knauer forswore allegiance to Hitler and the German Reich he swore falsely.”

Again, on page 670 of the same opinion, the Court stated:

“We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization. Those facts relate to the past—

to behavior and conduct. But the oath is in a different category. It relates to a state of mind and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen. It requires forswearing of allegiance in good faith and with no mental reservations. The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant for citizenship. Hence no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true was in fact false. Hence, the issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated."

"Moreover, when an alien takes the oath with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by deceit. The proceeding itself is then founded on fraud. A fraud is perpetuated on the naturalization court."

And, on page 674 of the same opinion, the Court said:

"We adhere to the prior rulings of this Court that Congress may provide for the cancellation of certificates of naturalization on the ground of fraud in their procurement and thus protect the courts and the nation against practices of aliens who by deceitful methods obtain the cherished status of citizenship here, the better to serve a foreign master."

Recently, in the case of

Klapptropp v. United States (decided by the Supreme Court on January 17, 1949), reported in 93 S.Ct. Law. Ed. Advance Opinion 279,

the Court reiterated its statement in the *Scheiderman* and *Baumgartner* cases, that "clear, unequivocal and convincing" evidence was necessary to deprive a naturalized citizen of his citizenship.

It seems clear from the decision of the Supreme Court that mere membership in an organization, such as the Bund, per se is not sufficient cause for the cancellation of a certificate of citizenship.

Schneidermann v. United States, supra;

Baumgartner v. United States, supra;

Knauer v. United States, supra;

Klapptropp v. United States, supra.

The Court defined what is meant by "clear, unequivocal and convincing" evidence of fraud. In so doing it provided a yardstick of measure as to when "clear, unequivocal and convincing" evidence of fraud has been established in a denaturalization case. For this reason these facts in the *Knauer* case have been heretofore set forth at length.

ANSWER TO APPELLANT'S ARGUMENTS.

In the first point made in his argument (Br. p. 28) appellant, in substance, says that the complaint in this action should have been supported by "an affidavit

showing good cause" for the filing of the complaint as provided by Title 8 USCA Section 738(a).

This Court seems to have fully passed on this issue in the case of

Schwinn v. U. S., 112 F.(2d) 74, at page 75, wherein this Court stated:

"* * * The portion of Section 405, Title U.S.C.A. which refers to the affidavit reads as follows: 'It shall be the duty of the United States district attorneys for the respective districts * * * upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured * * *'

"This affidavit is not jurisdictional, but merely makes it the duty of the district attorney to proceed. The district attorney could institute proceedings of this character sua sponte whenever he had reason to believe that the law had been violated in the respect alleged in the petition."

In this case the opinion of this Court was affirmed (1941), 61 S. Ct. 70, 311 U.S. 616, 85 L.Ed. 390.

Continuing in its opinion in the *Schwinn* case, this Court further said (page 76):

"The case of *United States v. Knight*, D.C., 291 F. 129, was a proceeding under the same statute and no affidavit to the district attorney upon which to base the case was proved—in this respect

exactly as here. The Court referred to *United States v. Leles*, D.C., 227 F. 189, 190, and said (page 130 of 291 F.), 'The statute is inclusive, not exclusive, and, like statutes for actions or complaints by private prosecutors, does not preclude public prosecutors from proceeding of their own motion to enforce the laws.' "

See, also,

U. S. v. Schuchhardt (D.C. Ind. 1943), 48 F. Supp. 876.

Answering No. II of appellant's argument on page 29 of his brief, wherein he states that there is no jurisdiction for cancellation of a State Court naturalization in a Federal Court, we list the following cases:

In

Johannessen v. U. S., 225 U.S. 227 (page 240), the Supreme Court, quoting from the case of *United States v. Norsch*, 42 F.Rep. 417, said:

"It was declared that the Government could sue in a Federal Court for the cancellation of a certificate that had been procured by fraud in a State Court, * * *"

There is a large number of cases holding that Federal Courts have jurisdiction to cancel naturalizations occurring in the State Courts for fraud and illegality.

See:

U. S. v. Norsch (C.C. Mo. 1890), 42 F. 417;
U. S. v. Simon (C.C. Mass. 1909), 170 F. 680;
U. S. v. Spohrer (C.C. N. J. 1910), 175 F. 440;
U. S. v. Nisbet (D.C. Wash. 1909), 168 F. 1005;

U. S. v. Meyer (D.C. Wash. 1909), 170 F. 983;
U. S. v. Aakervik (D.C. Ore. 1910), 180 F. 137;
U. S. v. Plaistow (D.C. N. Y. 1910), 189 F.
 1006;

U. S. v. Nopoulos (D.C. Iowa 1915), 225 F. 656;
U. S. v. Mansour (D.C. N. Y. 1908), 170 F. 671;
Luria v. U. S. (N. Y. 1913), 34 S.Ct. 10, 231
 U.S. 9, 58 L.Ed. 101, affirming *U. S. v. Luria*
 (D.C. 1911), 184 F. 643.

Answering argument of appellant wherein he contends that final judgment of the California State Court cannot be subjected to attack for intrinsic fraud in the judgment in the State Court (Br. p. 30), the Court's attention is invited to the case of

U. S. v. Siegel, 152 F.(2d) 614,

at page 615, wherein the Court stated:

"Although in *Schneiderman v. United States*, 320 U.S. 118, at page 124, 63 S.Ct. 1333, 87 L.Ed. 1796, the question of constitutionality was put aside as unnecessary for decision, a reading of the later *Baumgartner* case, *Baumgartner v. United States*, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525, convinces us, as it did the district judge, that the statutory authorization to revoke a judgment of naturalization procured by fraud is valid, whether the fraud be intrinsic or extrinsic."

Holding to the same effect are the cases of

United States v. Knauer, 328 U.S. 654, 66 S.Ct. 1304, 90 L.Ed. 1500;

United States v. Ness, 245 U.S. 319, 38 S.Ct. 118, 62 L.Ed. 321;

Baumgartner v. United States, supra;
Johannessen v. United States, supra.

It is belieevd that the third argument of appellant, set forth on page 32 of his brief, wherein he states that the judgment is erroneous, because it is based upon evidence failing to satisfy the clear and convincing evidence rule, has been heretofore fully answered in our brief.

Appellant on pages 21 and 22 of his brief sets forth Specification of Errors of Law. In the Specification of Errors in the Admission and Rejection of Evidence on page 23 of his brief, among other specification of errors appellant states that the trial Court erred in permitting appellant to be examined as an adverse witness over his objection that the appellee's interrogatories failed to specify he was to be called and the testimony expected to be elicited from him. (R. 105.)

In general, a party does not have a right to cross-examine a witness produced by him for the purpose of impeaching the witness. When, however, the witness is hostile, it is within the discretion of the Court to allow the party calling the witness to do the examining.

70 Corpus Juris 6175;

People v. Curran, 121 N.E. 637; 286 Ill. 302,
 affirmed 207 Ill. App. 302;

Curlez v. U. S., 67 F.(2d) 443;

U. S. v. Block, 88 F.(2d) 618; certiorari denied
 57 S.Ct. 793; 301 U.S. 690, 81 L.Ed. 1347.

In a prosecution for conspiracy it was proper for the Court to permit the State's attorney to examine

witnesses called by him where their answers were evasive and at variance with their statements before the grand jury and the State's attorney.

People v. Curran, supra.

Plaintiff's witness was an employee of defendant and exhibited considerable hostility to plaintiff in giving his testimony, and it was not an abuse of discretion to permit him to be cross-examined by plaintiff.

Semper v. American Press, 273 S.W. 217.

A proponent of a will, who was forced to call a subscribing witness, impeaching recitals in the affidavit clause, should not be restricted in cross-examination on the theory that such a witness is proponent's.

Lott v. Lott, 218 N.W. 447, 174 Minn. 13.

See, also,

United States v. Graham, 102 F.(2d), 436 certiorari denied *Graham v. U. S.*, 59 S.Ct. 1041, 307 U.S. 643, 83 L.Ed. 1524, rehearing denied 60 S.Ct. 68; 308 U.S. 632, 84 L.Ed. 526. Certiorari denied *Heed v. U. S.*, 59 S.Ct. 1041, 307 U.S. 643, 83 L.Ed. 1524.

Sheffman v. U. S., 289 F. 370;

Halbert v. U. S., 290 F. 765;

Beavers v. U. S., 3 F.(2d) 860;

Watkins v. U. S., 104 F.(2d) 465.

Appellee feels that the same comment covers specifications of errors No. VI on page 24 of Appellant's Brief.

It is believed that appellant's specification of errors IV and V, appearing on page 23 of his brief, are fully answered by the opinion of the Supreme Court in the cases of

Schneiderman v. U. S., supra;

Baumgartner v. U. S., supra;

Knauer v. U. S., supra;

Kuehn v. U. S., supra.

Counsel does not cite any authorities to sustain his position regarding specification of errors No. II wherein he states that the Court erred in permitting the appellant to be examined as to statements made by him to an army board. (R. 163-4.)

As to specification of errors No. III, appellant has offered no authority to sustain his position and the questions asked of appellant relative to conversations with his wife were of no evidentiary importance, the questions being as to whether or not his wife objected to his activities in the Bund and whether or not she tried to persuade him to give them up. (R. 172.)

CONTENTION OF APPELLEE.

It is the contention of appellee that we have these three factors present in this case:

FIRST: That the appellant was a member of the German-American Bund and other German allied propaganda organizations;

SECOND: That he knew the purposes, objects and aims of these organizations and subscribed to same;

THIRD: That his activities did not stop with mere membership and knowledge of the purposes of the organizations, but that, so far as he was personally able, he showed an endorsement of the various practices and objects by his actions and words.

CONCLUSION.

As it appears that there was ample evidence presented to the Court to sustain the Findings of Fact and Conclusions of Law and that the facts in this case are somewhat analogous to those in the case of *Knauer v. United States*, supra, it is respectfully urged that the decision of the Court below should be affirmed.

Dated, San Francisco, California,
April 1, 1949.

Respectfully submitted,

FRANK J. HENNESSY,

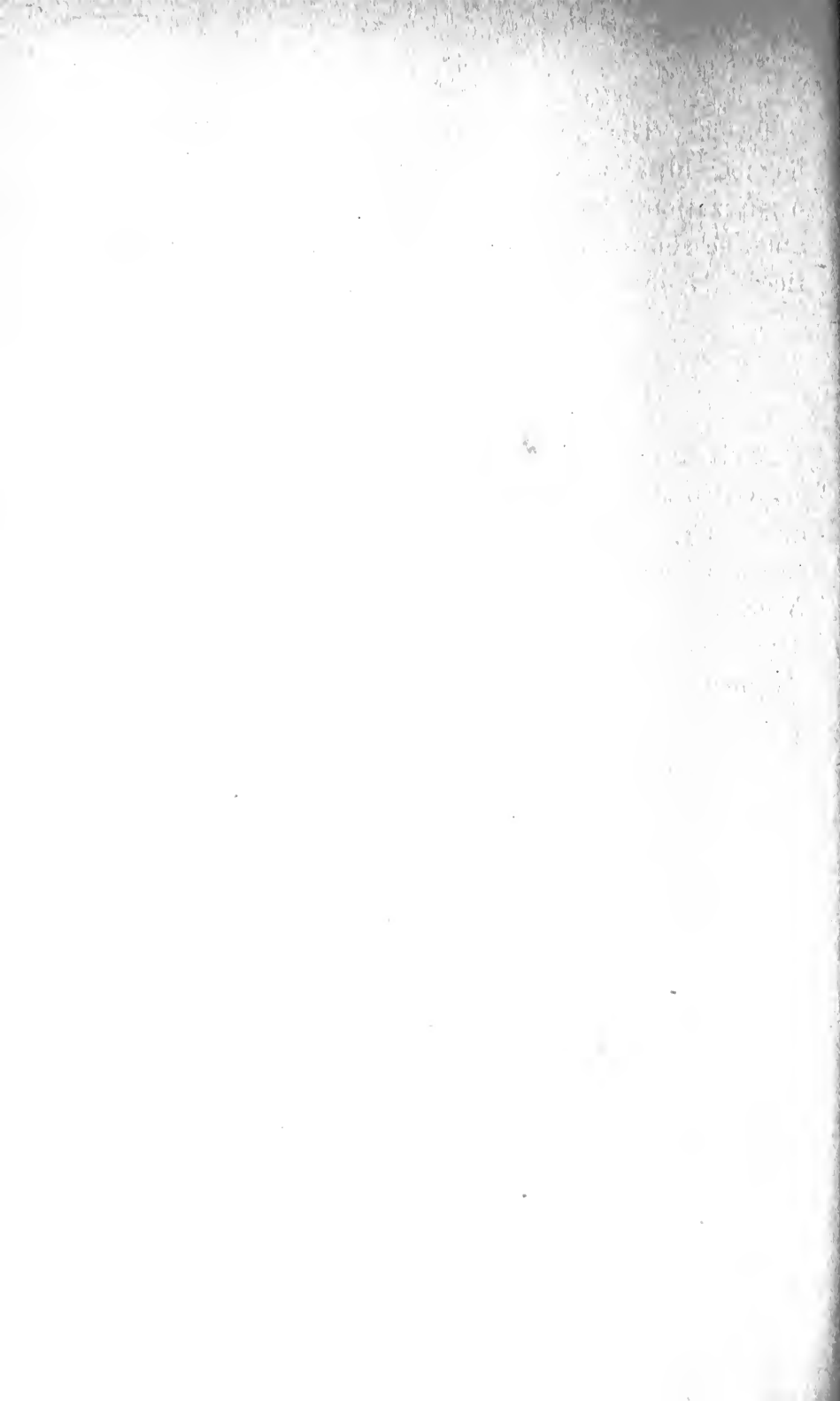
United States Attorney,

EDGAR R. BONSALL,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)



Appendix.

Appendix

In Section 4, Act of June 29, 1906 (34 Stat. 598) it is provided:

“It shall be made to appear to the satisfaction of the Court admitting any alien to citizenship that immediately preceding the date of his application, he has resided continuously within the United States 5 years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence and occupation of each witness shall be set forth in the record.”

Section 338(a) of the Nationality Act of 1940 (Title 8 U.S.C.A. 738) provides:

“It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground

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that such order and certificate of naturalization were illegally procured.

FINDINGS AND CONCLUSIONS AS TO THE COMMON ISSUE.

I.

In or about October, 1924, there was organized in Chicago, Illinois, the "Free Society of Teutonia" which, by subsequent changes of name, became known in 1926 as the "National Socialist Society of Teutonia", in 1932 as the "Friends of the Hitler Movement", in June, 1933 as the "Bund Freunde des Neuen Deutschland" or the "Bund Friends of the New Germany", and in March, 1936 as the "Amerika-Deutscher Volksbund" or "German-American Bund". The term "the Bund" is used to designate the organization at all times from and after June 30, 1933.)

II.

On or about June, 1933, local units of the National Socialist German Workers Party (commonly known as the "Nazi Party" or the "N. S. D. A. P.") then and theretofore existing in the United States ostensibly dissolved and associated themselves with and became amalgamated in the Bund.

III.

The Bund was active openly in the United States and operated until about the date of the declaration of war on December 8, 1941.

IV.

The Bund was an incorporated membership association in which membership was limited by the rules of the organization to persons of "Aryan" descent (as defined by the Nazi Party), free from Negro or Jewish blood. The membership was made up almost entirely of persons of German descent.

V.

The Bund, and each of the organizations mentioned in Paragraphs I and II hereinabove, was organized and conducted for German National Socialistic purposes, and was connected with and controlled in thought and action by the Nazi Party in Germany. In its organization and in its activities the Bund modeled itself upon and imitated the Nazi Party.

VI.

The constitution of the Bund as adopted in or about 1935, and as from time to time revised and published was false and misleading and designed to blind the American public to the true aims and purposes of the organization, which was dedicated to the accomplishment of the aims and purposes in the United States of German National Socialism, as expounded by Adolph Hitler and the Nazi Party.

VII.

The Bund stood for and taught the proposition that all people of German extraction were members of the German "Volk"; that no member of the "Volk" could ever be absorbed in or by any other nationality

or race; and that every member of the "Volk", regardless of what citizenship he might have acquired or derived in any other country, owed allegiance to Germany. That proposition is basic in the philosophy of the Nazi Party.

VIII.

The Bund stood for and taught that the German "Volk" was supreme over all other nationalities or races. That proposition is basic in the philosophy of the Nazi Party.

IX.

The Bund was conducted in accordance with the so-called "leadership principle", under which unquestioned obedience is owed to the leader. The leadership principle is a basic tenet of German National Socialism and is entirely inconsistent and at odds with the democratic concept of government. The Bund taught that under the leadership principle all persons of German extraction, as members of the German "Volk", owed obedience to the leader of the German nation who, from and after January, 1933, was Adolf Hitler.

X.

The Bund sought to instill and foster in United States citizens of German extraction a loyalty and allegiance to the "homeland" or "Vaterland"—Germany—thus to create in such citizenry a divided loyalty inconsistent with full and undivided allegiance to the United States owed by a citizen thereof.

XI.

The Bund taught that all people of "German" blood in the United States, regardless of their citizenship must serve the interests of Germany first, even though those interests might conflict with the interests of the United States.

XII.

The Bund attempted to create dissension among the people of the United States by urging discrimination against certain persons and groups of persons, for reasons of race, color or creed.

XIII.

At various times the Bund, or its predecessor, organizations named in Paragraph I hereinabove, published and distributed the following newspapers: "Das Neue Deutschland", "Deutsche Zeitung", "Deutscher Beobachter", "Deutscher Weckruf und Beobachter", and "Deutscher Weckruf und Beobachter and Free American". Each of such newspapers was the official organ of the organization at the time of its publication. Each of the newspapers was designed and used to disseminate the philosophy and precepts of German National Socialism in the United States, to foster in the readers thereof an allegiance to Germany and to the Nazi Party, and to incite in the readers thereof a contempt for democratic institutions and the government of the United States. The contents of such newspapers were Nazi-inspired, and in a large part the source material of the contents was secured by

the Bund or its predecessor organizations from propaganda agencies in Germany controlled by the Nazi Party.

XIV.

The Bund received Nazi propaganda material from such agencies as the Rassen Politische Auslands Korrespondentz (R. A. K.), Dienst Aus Deutschland, the Fichtebund, Volksbund fuer des Deuschtum im Ausland (V. D. A.), and Deutscher Auslands Institut (D. A. I.). Such material was disseminated by the Bund through the medium of newspapers (see Paragraph XIII, supra), and through books, pamphlets and leaflets distributed by Bund members at headquarters, Bund camps and elsewhere.

XV.

The Bund conducted a school at which officers and selected members were given special training in public speaking and in the methods and means of disseminating the principles of National Socialism. Such speakers were thereafter sent to Bund meetings and other gatherings to expound and advocate the philosophy of German National Socialism.

XVI.

The Bund sponsored and arranged speaking tours for members of the Nazi Party sent to the United States to address Bund meetings and other gatherings on the philosophy of German National Socialism.

XVII.

The Bund conducted camps at which Nazi flags and paraphernalia were exhibited; Nazi literature and propaganda were displayed, distributed and sold; speakers expounded the theories of German National Socialism; and at which both adults and youths were taught the principles of Nazi-ism and exhorted to be loyal to and preserve in their minds and lives the theories and philosophy of Germany over and above the theories and philosophies of the United States.

XVIII.

The Bund sought to and did instill in its members an allegiance to Germany and to the Nazi Party and its leaders through the exhibition and use of such Nazi paraphernalia as the swastika, through the singing of such Nazi songs as the "Horst Wessel", and through the display and repetition of such slogans as "Ein Volk" (one people—the German people), "Ein Reich" (one country—Germany), "Ein Fuehrer" (one leader—Adolph Hitler).

XIX.

Within the Bund there existed a uniformed group known as the "Ordnungs Dienst". The "Ordnungs Dienst" was patterned after the Nazi Storm Troopers of Germany. It was a militant body of selected Bund members trained in military techniques and designed to serve as a nucleus for a future and larger military organization if and when the aims of the Bund were accomplished in the United States. It was used by

the Bund to spread the philosophies of the Bund and of German National Socialism, and to distribute literature and propaganda of German origin and thought.

XX.

The Bund organized and conducted a Youth Group ("Jungenschaft") which was modeled upon the Hitler Youth in Germany. Members of the Youth Group were taught the precepts of the Nazi philosophy; they were instructed in the German language to the exclusion of English; they were taught to keep Germany, German leaders, and German ideas foremost in their minds and to be loyal to them; they were taught to be German rather than American.

XXI.

From and after 1935 there was a group within the Bund known as the "Prospective Citizens League". Membership in said league was made up of German nationals who had filed declarations of intention to become citizens of the United States, but whose citizenship had not been completed. This division of the Bund was created for the purposes of organizing and keeping German nationals within the Bund, in order to prevent assimilation of such German nationals in American life, and to foster in such German nationals an adherence to the Nazi cause and to German National Socialism as represented by the Bund in this country. Members of the Prospective Citizens League were, in fact, members of the Bund, engaged in all activities of the Bund, and enjoyed all the rights and privileges pertaining to membership in the Bund.

There was no distinction between a Bund "member" and a member of the Prospective Citizens League.

XXII.

There was within the Bund a group known as "Forderers" or "Sympathizers". That designation was devised to conceal the affiliations of certain persons within the Bund. "Forderers" or "Sympathizers" were, in fact, members of the Bund, engaged in all the activities of the Bund, and in Bund membership. There was no distinction between a "Forderer" or "Sympathizer" and a Bund "member".

XXIII.

Throughout the life of the Friends of the New Germany and the German-American Bund, these organizations maintained a thorough program for acquainting and indoctrinating its members with the National Socialism doctrines and objectives for which it stood. This took the form of the Bund newspaper to which members were urged to subscribe, Bund commands issued and read to the members, pamphlets and documents distributed among the members, speakers from Germany and others sent out by Bund headquarters, national and district conventions and regional meetings, celebration and observation of Hitler's birthday and other German holidays, instructions given by local leaders to the Bund membership, the order of procedure with the display of Nazi flags and banners, and the use of National Socialistic slogans.

The Bund's program and doctrines were irreconcilable with allegiance to the United States and with the principles of the United States Constitution. Persons acquainted with the Bund's program and doctrines and who continued to participate in the Bund were acting in a manner inconsistent with attachment to the principles of the United States Constitution and with loyalty to the United States.

Consequently, a strong presumption arises that the officers and members who were active participants in the Bund's program over a considerable period of time could not escape having knowledge of the Bund's National Socialistic program and its connection with and control by the Nazi Party and the German Government.

XXIV.

The aims and purposes of the Bund, as promulgated and carried out by the San Francisco, Oakland, and Concord units, were identical with the aims and purposes of the national organization. Among other things, these units endeavored to create sympathy amongst the people of German extraction for the New Germany and to counteract the Jewish boycott on German-made goods.

XXV.

Bund commands were received from national headquarters by these local units and read to the members. These commands instructed the units concerning the best manner by which the membership could be of

assistance to Germany, advised the units in all matters relative to National Socialism, and directed the units in the conduct of their affairs.

XXVI.

These local units of the Bund and of the Friends of the New Germany held membership meetings and social meetings. The membership meetings were for members only. Meetings of the units closed by singing the "Horst Wessel" song. The Nazi salute was the official salute of the units. Their official flag was the swastika. They also used the American flag. Contributions were solicited from the members for the "Fighting Fund" to defray legal expenses of Fritz Kuhn's trial in New York City. Members contributed to the German Winter Relief. Dues were paid and a part of same was sent to Bund headquarters in New York. Some members received both the 1937 and 1938 editions of the Bund Year Book. Members were urged to purchase and subscribe to the Bund newspaper, and many did so.

XXVII.

National Bund officials and prominent Nazis delivered speeches to the local units. Some of the speakers were Fritz Kuhn, Wilhelm Kunze and Herman Schwinn, West Coast Leader. These speeches concerned the New Germany, conditions therein, and the functions of the Bund in its relation to that country.

XXVIII.

Not only did these units at their membership meetings advocate the principles of National Socialism, but even at their social meetings they grasped the opportunity further to instruct their members along these lines. At these social evenings motion pictures depicted the progress of the New Germany under Hitler, and travelogues were shown. At such meetings propaganda literature, some of which was printed in Germany, was available for distribution and sale. Speeches by Hitler, Goebbels, and other prominent Nazi officials, as well as the Bund newspaper, were on sale.

XXIX.

The local units had a uniformed group, the Ordnungs Dienst, or the O.D. Their uniforms consisted of a cap, white shirt (at one time a gray shirt), black tie, Sam Browne belt, breeches, and a white and red arm band with the swastika insignia thereon. The O.D. acted as a color guard and displayed both the American flag and the Bund flag which bore the swastika emblem. The uniforms were similar to those worn by the Storm Troopers in Germany, and the purpose of the O.D. was principally to protect members from attack during meetings, to act as ushers, and to distribute German pamphlets and literature.

XXX.

The local units sent representatives to the various district and national Bund conventions. In Germany the Bund in 1936 paraded in uniform through the

streets of Berlin to the Reich Chancellory. This group presented a "Golden Book" to Hitler, in which were inscribed the names of the individuals who contributed a sum of money which was also presented to Hitler at that time. Some members of the local units contributed to this fund.

XXXI.

In carrying out the activities hereinabove described, and seeking to accomplish their real aims and purposes, the local units of the Bund demonstrated themselves to be militant Nazi organizations, antagonistic to the democratic form of government and to the Constitution and laws of the United States, and that they were un-American and subversive.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court draws the following Conclusions of Law:

I.

In carrying out the activities hereinabove described, and in seeking to accomplish its real aims and purposes, the Bund demonstrated itself to be a German Militant "Fifth Column" organization in the United States, antagonistic to the democratic form of government and to the Constitution and laws of the United States un-American and subversive. One who believes in the National Socialist philosophy and form of government cannot at the same time be loyal to the United States nor attached to the principles of the Constitution and laws of the United States.

II.

The principles of German National Socialism are opposed in all respects to the principles of democracy and to the Constitution and laws of the United States.

**FINDINGS OF FACT AS TO JOHANNES FREDERICK
BECHTEL (No. 22411-G) (Tr. p. 55).**

I.

That the defendant, Johannes Frederick Bechtel, was at the time of the filing of this action a resident of the City of Oakland, County of Alameda, State of California, and within the jurisdiction of this Court.

II.

That the defendant was born in Landeshut County, Germany, on May 24, 1900; came to the United States on September 23, 1925; filed his Declaration of Intention to become a citizen of the United States in the Superior Court of the State of California in and for the County of Alameda on April 29, 1927, and thereafter his Petition for Citizenship therein on November 22, 1933, and thereafter, with two witnesses to said Declaration and Petition, was examined by the United States Naturalization Examiner in Oakland, California, thereon; thereafter, by an order of said Court, defendant was admitted to become a citizen of the United States on February 23, 1934, at the conclusion of an open hearing in said Court on said petition at

which he and his two witnesses were examined by said Court and W. J. Kane, United States Naturalization Examiner, and testified thereon, and thereupon took the oath of allegiance to the United States; and, by virtue of said Order of said Court, Certificate of Naturalization No. 3802606 was issued to defendant, who now claims citizenship thereunder.

III.

That the defendant joined the F.D.N.D. about September 1934, and continued as a member of that organization when the name was changed to G.A.B. in 1936, and thereafter he attended meetings and gatherings of that organization up until and throughout the year 1938 and into 1939. The defendant attended Bund Forums, and subscribed to the "Weckruf and Beobachter" in 1939 which he read for a period of at least one year.

IV.

That during the period of defendant's membership in the F.D.N.D. and G.A.B. he was on numerous occasions clothed in the uniform of the O.D., attended meetings of the O.D., wore the swastika arm band of such uniformed group, and assisted in the various activities of the organizations such as marching, carrying the swastika banner, and keeping the fire from spreading when a large swastika was burned on a hillside in Dublin Canyon at a picnic held by the G.A.B. in the year 1938.

V.

That at numerous meetings and functions of such organizations attended by the defendant, he engaged in giving the "Heil" or "Sieg Heil" salute and in the singing of the "Horst Wessel" song.

VI.

That the defendant went with Gottfried Karl Hein, local Bundesfuehrer, and others to Concord, Contra Costa County, California, in August, 1936, at which time the Concord unit of the F.D.N.D. was organized.

VII.

That in May 1938, in California Hall, the defendant attended the Western District Convention (Gautag West) of the G.A.B. which was addressed by Herman Schwinn, Western District Leader of the G.A.B., and which was attended by Fritz Kuhn, National Leader, who was then under indictment by the Federal Government in New York, and by Wilhelm Kunze, treasurer of the National Office of the G.A.B.

VIII.

That between the years 1934 and 1939 defendant stated to various persons that he approved of Hitler's economic and social policies in Germany and approved of his treatment of the Jews in Germany, and also stated that he desired and intended to return to Germany.

IX.

That on December 14, 1942, defendant stated before a board of United States army officers, sitting as an

Individual Exclusion Hearing Board, that he honored the swastika flag equally with the American flag.

X.

That the defendant knew and understood the leadership principle as enunciated and subscribed to by the leaders and members of the F.D.N.D. and G.A.B.

XI.

That the defendant burned his Bund uniform sometime about the year 1939, and knew that Gottfried Karl Hein and Fred Kuehn also burned their uniforms.

XII.

That on defendant's tenth wedding anniversary on April 24, 1938, he gave a party at his home, at which time he had displayed on the ceiling of one of the rooms a large swastika flag. This party was attended by Gottfried Karl Hein, George Balke, and other members of the G.A.B.

XIII.

That the defendant ceased attending meetings of the G.A.B. because of personal disagreements with Gottfried Karl Hein, and not because of a disagreement with the policies and ideologies of the G.A.B. itself.

XIV.

That on the date of defendant's petition for naturalization, at the time of his naturalization, and at all times subsequently, the defendant's allegiance has

been to Germany rather than to the United States, and his attachment has been to National Socialism rather than to the principles of the United States Constitution. His lack of allegiance to the United States and his lack of attachment to the principles of the Constitution have not changed or varied in the interval since his naturalization, and his attitude in these respects was the same when he was naturalized as in subsequent years up to the date of the trial.

XV.

That the defendant was acquainted with the National Socialistic character and connections of the Bund, as set out in the Findings of Fact in the consolidated case regarding the German-American Bund, and he was in sympathy and in agreement with them.

XVI.

That the sworn oaths and statements of the defendant in his Petition for Naturalization and in his oath of allegiance at the date of naturalization, as set forth in the complaint were then and there false, fraudulent and illegal in that the defendant, at the time of taking said oaths, did not in fact absolutely and entirely renounce and abjure all allegiance and fidelity to Germany and the German Reich, but in fact intended to, and did secretly reserve and retain allegiance and fidelity to Germany and the German Reich; nor did the defendant then and there intend to support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic,

but in fact the said defendant then and there secretly reserved his intention not to support and defend the Constitution and laws of the United States against Germany and the German Reich should they become enemies of the United States of America; nor did the defendant at the time of taking said oaths intend to bear true faith and allegiance to the United States of America, but in fact secretly reserved and retained his intention not to bear true faith and allegiance to the United States of America. That by taking said oaths falsely, with the secret mental reservations and intentions as aforesaid, the defendant deceived the United States, its officers and agents, and the said Naturalization Court at the date of admission to citizenship in order that said defendant might obtain the rights, privileges and protection of citizenship in the United States of America.

XVII.

The Findings of Fact with respect to the consolidated common issue hereinabove set forth are incorporated herein and made a part hereof by reference.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the Court concludes as matters of law:

I.

That the defendant resides within the jurisdiction of this Court, and the Court has jurisdiction over the person of the defendant and of the subject matter of this action.

II.

That the Certificate of Naturalization, granted as aforesaid, was illegally and fraudulently procured by the said defendant, and should be revoked, set aside and canceled.

III.

The Conclusions of Law with respect to the consolidated common issues hereinabove set forth are incorporated herein and made a part hereof by reference.

The foregoing Findings of Fact and Conclusions of Law as to each of the defendants, while included in one document and entitled in all the cases jointly, are separate and distinct as to each of the defendants, and are deemed by the Court to have the same force and effect as if each of said Findings as to each defendant were set forth in separate documents, separately captioned.

Let it further appear of record that the Findings as to each individual defendant are in no wise based upon the Findings as to any other individual defendant, except that the Findings as to the consolidated issues apply by incorporation, as hereinbefore set forth, to the case of each individual defendant.

Dated: March 31, 1944.

/s/ LOUIS E. GOODMAN,

United States District Judge.

(Endorsed) Filed March 31, 1948.

C. W. CALBREATH, *Clerk.*

ORDER CONSOLIDATING CERTAIN NATURALIZATION CASES FOR THE PURPOSE OF A JOINT TRIAL ON THE COMMON QUESTION OF FACT AND LAW WITH REFERENCE TO THE ISSUES INVOLVING THE GERMAN-AMERICAN BUND, ITS AFFILIATES AND PREDECESSORS. (Tr. p. 6.)

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room hereof, in the City and County of San Francisco, on Monday, the 31st day of May, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Louis E. Goodman, District Judge.

Civ. No. 22,398-G, United States v. Bruno Holtz;

Civ. No. 22,426-R, United States v. Frank Joseph Andemahr;

Civ. No. 22,508-R, United States v. Ernst Arthur George Blake, alias;

Civ. No. 22,536-R, United States v. Adolph Emil Becker, alias;

Civ. No. 22,411-S, United States v. Johannes Frederick Bechtel;

Civ. No. 22,526-G, United States v. Karl Joseph Beyerle, alias;

Civ. No. 22,405-R, United States v. Herman Alfred Bohme;

Civ. No. 22,552-R, United States v. Fred Bernard Christophel, alias;

Civ. No. 22,542-G, United States v. Ernest John Dittmer;

Civ. No. 22,541-S, United States v. Margareth Ida Dittmer;

Civ. No. 22,515-R, United States v. Otto Fuerst, alias;

Civ. No. 22,556-R, United States v. Joseph Gerhart, alias;

Civ. No. 22,419-S, United States v. Gottfried Karl Hein;

Civ. No. 22,516-G, United States v. Andreas Peter Jessen, alias;

Civ. No. 22,475-R, United States v. John Jacob Kemnitz, alias;

Civ. No. 22,507-G, United States v. Friedrich Wilhelm Kuehn, alias;

Civ. No. 22,485-R, United States v. Max Kummerling;

Civ. No. 22,409-S, United States v. Herbert Landes;

Civ. No. 22,537-S, United States v. Christian Wilhelm Letsch, alias;

Civ. No. 22,519-R, United States v. Kurt Max Frederick Nitz;

Civ. No. 22,404-G, United States v. George Orde-
mann;

Civ. No. 22,525-S, United States v. Adolf Friederick Rampendahl, alias;

Civ. No. 22,492-R, United States v. Karl Theodor Stautz;

Civ. No. 22,557-S, United States v. Wilhelm Albert Ungerfrohren.

After hearing Frank H. Patton, Esq., Special Assistant to the Attorney General, it is Ordered, that the motion for an order consolidating the twenty-four above-entitled civil actions for the purpose of a joint trial on the common question of fact and law with reference to the issues involving the German-American Bund, its affiliates and predecessors, there being no objection filed by any of said defendants, be and the same is hereby granted. Further Ordered, that the several defendants be present at a pre-trial conference for the simplification of the issues involved in the consolidated trial, and such other matters as may aid in its disposition, on the 13th day of July, 1943, at 10:00 o'clock A.M.; and it is Further Ordered, that the trial, as provided for in the order of consolidation of the common issues of fact and law, shall be had before the Honorable Louis E. Goodman, United States District Judge, on the 20th day of July, 1943, in accordance with a signed order this day filed.



No. 12,094

IN THE

United States Court of Appeals
For the Ninth Circuit

PAUL FIX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

EUGENE H. O'DONNELL,

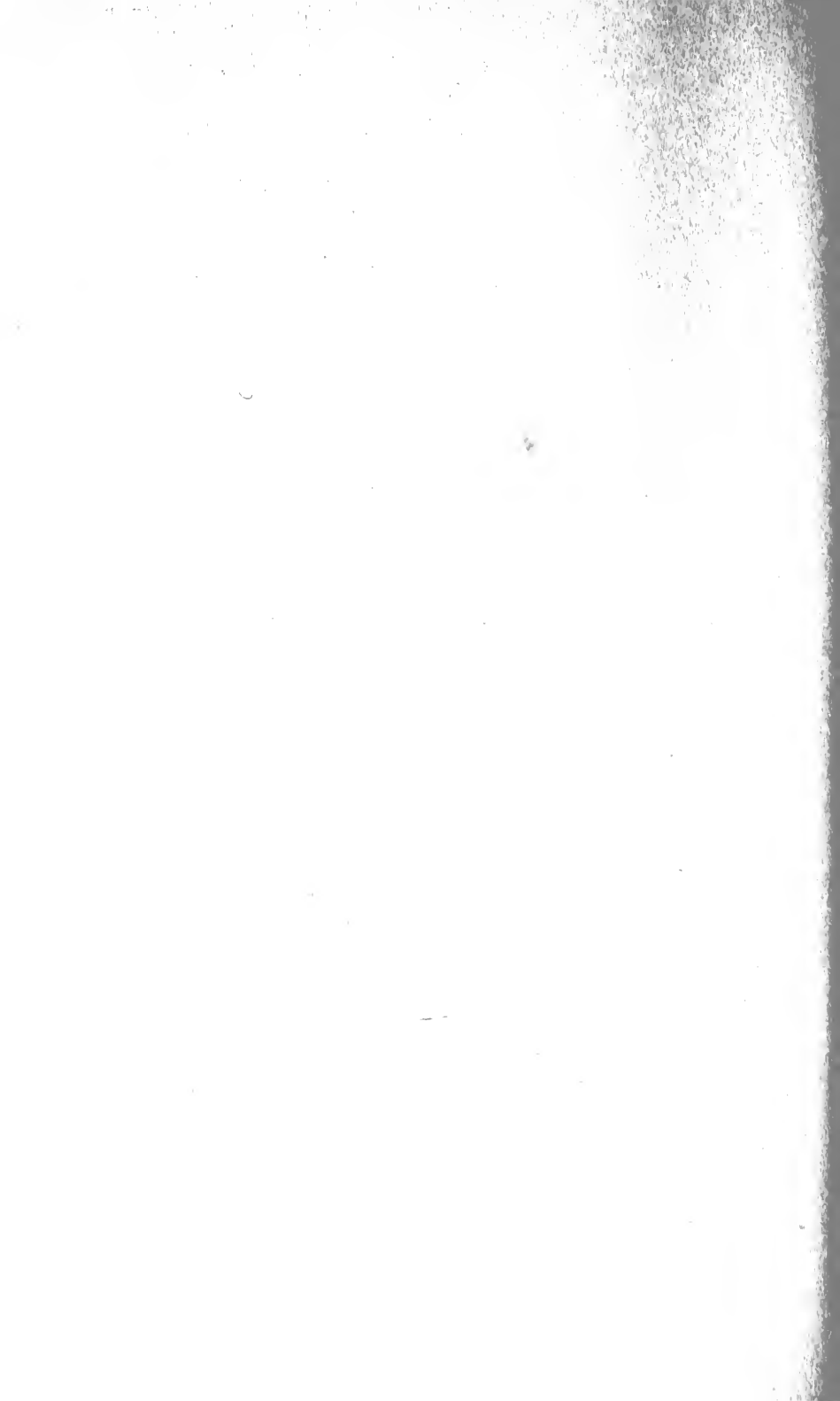
785 Market Street, San Francisco 3, California,

Attorney for Appellant.

FILED

MAR - 3 1949

DARL P. O'BRIEN,



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No. 12,094

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PAUL FIX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF BASIS OF JURISDICTION.

Appellant, Paul Fix, a naturalized citizen of the United States of America, residing at Lafayette, Contra Costa County, California, appeals from a final judgment (R. 36) of the United States District Court for the Northern District of California, Southern Division, entered against him in a suit in equity canceling his certificate of naturalization upon the ground that the same was illegally and fraudulently procured by appellant.

A complaint to revoke appellant's citizenship was filed on April 13, 1943 (R. 1). A final judgment of the United States District Court canceling appellant's certificate of naturalization was entered on April 7, 1944 (R. 36), based upon findings against the German

American Bund and against appellant (R. 27). Appellant's motion for a new trial (R. 38) was denied April 24, 1944 (R. 40). On July 26, 1944, appellant filed his notice of appeal to this Court (R. 41). The opinion of the United States District Court is reported in 54 Fed. Supp. 63.

The District Court had jurisdiction to entertain the bill under the provisions of Title 8, U.S.C.A., Section 738 and Title 28 U.S.C.A., Section 41 (1), now Title 28 U.S.C.A., Sections 1331 and 1345.

This Court has jurisdiction on appeal to review the judgment of the Court below under the provisions of Title 28, U.S.C.A., Section 225 (2) first, now title 28 U.S.C.A., Section 1291.

Under the sections last quoted the judgment is a final judgment and is, therefore, appealable.

The pleadings necessary to show the existence of the jurisdiction of this Court are:

The complaint (R. 1);

The answer (R. 2);

The amended answer (R. 14);

Findings of Fact and Conclusions of Law (R. 27);

Judgment (R. 36);

Notice of Appeal (R. 41).

SPECIFICATION OF ERRORS RELIED UPON.

Appellant contends that the trial Court erred in the following particulars:

1. That the evidence is insufficient to justify the judgment;
 2. That the judgment is contrary to the evidence;
 3. That the judgment is contrary to law;
 4. That the trial Court erred in denying appellant's motion for a new trial;
 5. That the evidence is insufficient to justify the making of the following numbered Findings of Fact:
Finding No. 12 (R. 32);
Finding No. 13 (R. 33);
Finding No. 14 (R. 33).
 6. That the evidence is insufficient to justify the following Conclusion of Law:
Conclusion of Law No. 2 (R. 34).
-

**STATUTE, THE VALIDITY AND APPLICATION
OF WHICH IS INVOLVED.**

Title 8 U.S.C.A., Sec. 738 (a), which provides as follows:

(a) "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured."

STATEMENT OF CASE.**(Consolidated Bund Trial.)**

The present case, together with twenty-seven (27) others, was consolidated for the sole purpose of receiving evidence as to the principles and practices of the German American Bund (opinion of District Judge, 54 Fed. Supp. (2d) 63). The record in that trial was voluminous. On December 20, 1948, an order was made by this Honorable Court dispensing with the printing of the reporter's transcript and exhibits (R. 67). The consolidated trial was a trial of the Bund itself and not of the individual defendants. The Government produced a number of witnesses to prove that the German American Bund and its affiliated organizations were subversive in design and character. Among the witnesses were men who admittedly were leaders in the Bund, some of whom were released from prison in order to testify. Appellant was in no way connected with any of these notorious leaders, nor was it proved that he had ever become acquainted with them or actively participated in their subversive practices. The record in this case shows only that appellant attended meetings of the German American Bund and is absolutely devoid of any evidence showing that appellant knew about the principles and practices of that organization or subscribed to them.

STATEMENT OF CASE.**(Appellant's Individual Trial.)**

Appellant, Paul Fix, is the defendant in an action brought by the United States to revoke his citizenship pursuant to Section 338 of the Nationality Act of 1940 (54 Stat. 1158; U. S. Code, Title 8, Section 738). After separate trial before the United States District Court of the Northern District of California, Southern Division, on issues concerning appellant's actions and conduct, the trial Court prepared and filed its Findings of Fact and Conclusions of Law (R. 27) holding that the Certificate of Naturalization issued to appellant had been illegally and fraudulently procured, and on March 31, 1934, the judge of said Court signed a judgment directing cancelation of the Certificate of Naturalization issued to appellant (R. 36).

Appellant moved the trial Court for a new trial (R. 38) and on April 28, 1944, an order was made denying said motion (R. 40). On July 26, 1944, appellant filed his Notice of Appeal from said judgment (R. 41) and on August 22, 1944, filed his statement of points upon which appellant intended to rely upon appeal (R. 46).

SUMMARY OF EVIDENCE.

Appellant, Paul Fix, was born at Haslach, Germany (R. 77), on January 26, 1905. Before coming to this country he worked as a farmer (R. 77). His education received in Germany was equivalent to high

school training in this country (R. 77). He migrated to the United States in 1928, arriving in San Francisco on December 17th of that year (R. 77). He established his residence in San Francisco and has lived in the vicinity of the Bay Area ever since, at the present time being a resident of Lafayette, Contra Costa County, California. On March 4, 1929, he started to work as an apprentice baker (R. 78) and has continued to work at that trade ever since that time, save for a short period of time, during the year 1939, when he engaged in a tavern and restaurant business (R. 79). For the past few years appellant has been engaged in the bakery business at Lafayette, Contra Costa County, California.

Appellant married one Mary Winkler (R. 80), who died in childbirth in 1932 (R. 81). The child survived the mother and after his wife's death appellant gave the child for adoption (R. 83). In October of 1933, appellant married Meta Schlegel in San Francisco, which marriage was dissolved by decree of divorce six years later (R. 84). In 1940, appellant met his present wife in Modesto, California (R. 326), and shortly thereafter appellant and his present wife, Thelma Fix, started a bakery business in Berkeley, California, as co-partners. Appellant and his present wife, Thelma Fix, were married in 1940, and ever since have been, and now are, husband and wife and living together as such.

Appellant filed his declaration to become a citizen of the United States in the United States District Court in and for the Northern District of California,

Southern Division, on June 29, 1929, and his petition for citizenship was filed on September 27, 1935, and on January 6, 1936, an order was made by the afore-said Court admitting appellant to citizenship (R. 19).

In 1937 appellant made a trip to Germany for the purpose of visiting his folks and the family of his wife (R. 85), arriving in Hamburg on March 1, 1937. While in Germany appellant purchased an automobile and made a trip to France, Switzerland and Austria (R. 358). While in Germany appellant also purchased a rifle. At no time during the entire trip did appellant attend any Bund meetings (R. 356). On two different occasions while in attendance at public meetings appellant called out the words "Drei Liter" instead of "Heil Hitler" in order "not to fall out of line" (R. 109).

In 1936, appellant became a member of the German American Bund (R. 85) principally because he was selling them bakery products (R. 101). He remained a member of that organization for a period of only three months (R. 19). Appellant resigned from the organization because the membership was not being advised by the officers thereof as to what disposition was being made of the dues collected (R. 100). Appellant was never an officer of the German-American Bund or The Friends of New Germany. At no time did he ever wear a uniform. He started to read "Mein Kampf", but found the book too deep for him and did not complete reading the same (R. 96). Appellant at no time distributed any Bund literature, nor was he a speaker at any of their meetings. In Septem-

ber of 1939, in company with other members of the Bund, who shared expenses, he drove his automobile to Los Angeles and while there attended a convention of the Western District of the Bund (R. 114). At the request of the members present at said convention, appellant, with numerous others, sent a telegram to Senator Johnson urging neutrality (R. 117). Appellant attended a Bund picnic in Dublin Canyon during the month of June, 1938, where a Swastika was burned on the hill side. He read the German-American Bund paper, the "Deutsches", the "Weekruf und Beobachter" and the "Free American", which literature was distributed at the Bund meetings (R. 123).

Witnesses for the Government, one of whom had been convicted of a felony (R. 144) testified that in 1942, appellant called President Roosevelt a "warmonger" (R. 145); that appellant had refused to buy war bonds (R. 146) and had stated that the gold in Fort Knox would have no value (R. 146); that he would not aid in the salvage drive (R. 147) and when speaking of Jewish people he applied to them vile and vulgar names (R. 152); that appellant stated that Hitler would take over this country (R. 164) and that all unions should be broken as they were in Germany (R. 181) that in discussing the bombing of Pearl Harbor appellant stated "it suited this country just right" (R. 145); that on occasions when soldiers were marching past his place of business appellant would remark "there goes the condemned row; they are going off to slaughter" (R. 145); that in discussions pertaining to his being drafted he stated "that

he would sit in the guard house before he would serve in the Army"; that Hitler was going to take over this country (R. 164); that all Germans in this country were armed and were prepared to take over South America and the United States (R. 181); that in July of 1940, he owned a phonograph and loud speaker together with several records of German music, one of which was a German march which ended with the words "Heil Hitler" (R. 174); that when Germany took over this country they were going to dispose of all the Jewish people and General Mosley was to be the head man (R. 175), at which time we would have a much better government (R. 175); that since he had been in Lafayette, appellant had been heard to state "if President Roosevelt had kept his big mouth shut the United States would not have been in the war" (R. 185); that in 1937, after his return from Germany appellant stated "we may need a Hitler here to change our conditions" (R. 200) and he did not want any Jewish salesmen calling on him (R. 202); that in 1940 he was the owner of three guns, including a tear gas gun (R. 174).

Appellant produced several witnesses who testified that he bore a good reputation in the community in which he lived (R. 212; 232; 254; 256; 267; 301; 322) that he cooked doughnuts for the Red Cross (R. 206); that he placed patriotic advertisements in the local newspapers (R. 213; 219; 315); that he made contributions towards the war effort (R. 221); that he never discussed the war or politics (R. 232) or made any disloyal statements (R. 234; 241, 248; 252; 255;

266; 270; 278; 282); that he was a hardworking baker, working fourteen to sixteen hours a day (R. 249); that he gave a stove to the soldiers stationed in the vicinity in which he lived (R. 264); that he did not display any German flags or decorations in his home (R. 285) or pictures of Hitler (R. 249; 300); that he always conducted himself as one who was proud to be a citizen of the United States (R. 256); that he never said anything about Germany or discussed the form of government under Hitler (R. 270); that the Germans had been misled by the Nazi Party (R. 271); that he never made any derogatory statements against the Government of the United States (R. 270); that in April, 1943, after the bombardment of Cologne, appellant remarked "the Germans were getting back what they were dishing out" (R. 276); that he gave a discount to St. Mary's Pre-flight School on all bakery goods sold to the school; that he always said if he were inducted into the Army that he would fight for his country (R. 328); that "he had no hatred for race, color or creed" (R. 328) that he gave his grease, rubber and tin cans to the salvage drive (R. 341); that he purchased war bonds (R. 352); that he promised in the event of disaster to turn out 2500 loaves of bread a day (R. 369); that he gave his dog to the Army (R. 370); that he did not think that Germany had the right to declare war on the United States (R. 389).

In brief the plaintiff's case against appellant is as follows:

(1) He attended meetings of the Friends of New Germany, without being a member thereof;

(2) He was a member of the German American Bund for a period of three months;

(3) While a member of the Bund he attended meetings, saw the Swatiska displayed; read literature distributed at the meetings and listened to lectures given by the Bund leaders;

(4) Attended the Bund picnic in Dublin Canyon;

(5) Attended the convention of the Gautag West in Los Angeles;

(6) Joined with others in sending a telegram to Senator Johnson urging that United States remain neutral in the European War;

(7) He was the owner of three guns;

(8) He was the owner of a phonograph and several records of German Songs, including a German march which ended with the words "Heil Hitler";

(9) He expressed himself on certain matters concerning the Government, the War, the President and members of his Cabinet and the salvage drive which a native born citizen could have done with immunity.

ARGUMENT.

THE JUDGMENT IS ERRONEOUS BECAUSE IT IS NOT SUPPORTED BY EVIDENCE SUFFICIENT TO SATISFY THE CLEAR AND CONVINCING EVIDENCE RULE.

It is appellant's position in seeking a reversal in this case, that the evidence is insufficient to sustain the judgment of the trial Court in that the same falls short of the proof required under the "clear and convincing evidence rule". Furthermore, appellant respectfully submits, even with all the inferences and presumptions being in favor of the judgment as rendered, an examination of the record will disclose that the only acts and declarations of appellant upon which the trial Court entered judgment were acts and declarations that appellant was entitled to do and make as a citizen of the United States and which in no way reflect a state of mind on appellant's part incompatible with his oath of allégiance made on the date of his naturalization. Our Courts in the past have so often announced the degree of evidence sufficient to sustain a judgment of denaturalization in cases of the present type that the same has in reality become an elementary principle of law. In *Schneiderman v. United States*, 320 U. S. 118 (87 Law. Ed. 1796), the Supreme Court said:

"To set aside such a grant the evidence must be 'clear, unequivocal and convincing'—'it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.' "

Similar language more forcibly stated can be found in:

Baumgartner v. U. S., 322 U. S. 655 (88 Law. Ed. 1525);

Knauer v. U. S., 328 U. S. 654 (90 Law. Ed. 1500);

Bergmann v. U. S. (C.C.A.-9), 144 Fed. (2d) 34;

Scheurer v. U. S. (C.C.A.-9), 150 Fed. (2d) 535.

And in the very recent case of *Klapprott v. United States*, decided January 17, 1949, and reported in Vol. 93, Supreme Court Law. Ed. Advance Opinions 279, the Supreme Court even extended the rule announced in the previously cited cases and held that the required proof in cases of this type must be substantially identical with that required in a criminal case, that is, proof beyond a reasonable doubt, and this language was used by the Court when the defendant allowed his default to be entered. In that case the Supreme Court said at page 287:

“This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such a deprivation may even rest heavily upon his children. 8 USCA Sec. 719, 2 FCA title 8, Sec. 719. As a result of the denaturalization here, petitioner has been ordered deported. ‘To deport one who so claims to be a citizen obviously deprives him of liberty, * * * It may result also in loss of both property and life; or of all that makes life worth living.’ Ng Fung

Ho v. White, 259 US 276, 284, 66 L ed 938, 942, 42 S Ct 492. Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment.

Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. *Schneiderman v. United States*, 320 US 118, 158, 87 L ed 1796, 1819, 63 S Ct 1333. This burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt. The same factors that caused us to require proof of this nature as a prerequisite to denaturalization judgments in hearings with the defendant present apply at least with equal force to proceedings in which a citizen is stripped of his citizenship rights in his absence. Assuming that no additional procedural safeguards are required, it is our opinion that courts should not in Sec. 738 proceedings deprive a person of his citizenship until a Government first offers proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearance.”

See also *U. S. v. Kusche* (D.C. Cal. 1944), 56 Fed. Supp. 201 and *U. S. v. Korner* (D.C. Cal., 1944), 56 Fed. Supp. 242, where U. S. District Judge Pierson Hall dismissed twenty-six (26) complaints similar to

the instant one. No appeal was taken from his decision.

Appellant respectfully urges that there is nothing in the evidence that justified the judgment in the instant case. The record is devoid of any evidence which even tends to show that at the time of his naturalization in 1936 appellant retained even a spark of allegiance to Germany. His activities and expression have not been incompatible with allegiance to this Government. The judgment in this case is based solely upon the ground, and upon that ground alone, that from the acts and declarations of the appellant since the date of his naturalization, which he was entitled to make as an American citizen, there can be imputed to him a mental reservation of foreign allegiance. Such is not the law and is wholly repugnant to the rule announced in the previously cited cases. A comparison will properly disclose that the evidence is insufficient in the instant case to warrant the judgment entered by the trial Court finding that this appellant procured his certificate of naturalization fraudulently and illegally. The judgment in the instant case is based solely on "proof by implication", the type of proof so strongly disapproved of in the *Schneiderman* case.

CONCLUSION.

Appellant respectfully submits that the evidence in this case does not justify the judgment of the trial Court and appellant respectfully urges that the decree canceling his citizenship be reversed.

Dated, San Francisco, California,
March 2, 1949.

Respectfully submitted,

EUGENE H. O'DONNELL,

Attorney for Appellant.

No. 12,094

IN THE

United States Court of Appeals
For the Ninth Circuit

PAUL FIX,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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United States Attorney,

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FILED

APR - 1 1949

W. P. O'BRIEN,
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No. 12,094

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PAUL FIX,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is one of seven denaturalization cases involving members of the German-American Bund which were actually tried in the United States District Court for the Northern District of California and in which the Government obtained judgment against all of the defendants.

The cases were consolidated (*United States v. Bruno Holtz, et al.*, 43 F. Supp. 63) for the trial of the common issues of law and fact as to the un-American and subversive character of the German-American Bund and predecessor organizations, of which all of the defendants were members, reserving to the individual defendants separate trials as to their

separate and individual statements, acts, conduct and membership in, knowledge of the principles and purposes of the German-American Bund and its predecessor organizations, and their personal participation in the activities of said organization, together with their personal endorsement of such principles, aims and activities.

FINDINGS AND CONCLUSIONS AS TO THE COMMON ISSUE.

After hearing lengthy testimony with respect to the principles, purposes and activities of the German-American Bund and its predecessor organizations, the Court below prepared findings of fact and conclusions of law as to the common issue, which are set forth herein in full in the appendix.

The conclusions of law of the Court below were succinct and to the point and are well worthy of repetition. They are as follows:

- “(1) In carrying out the activities hereinabove described, and in seeking to accomplish its real aims and purposes, the Bund demonstrated itself to be a German militant ‘Fifth Column’ organization in the United States, antagonistic to the democratic form of government and to the Constitution and laws of the United States un-American and subversive. One who believes in the Nationalist Socialist philosophy and form of government cannot at the same time be loyal to the United States nor attached to the principles of the Constitution and laws of the United States.
- (2) The principles of German National Social-

ism are opposed in all respects to the principles of democracy and to the Constitution and laws of the United States.”

APPELLANT'S INDIVIDUAL TRIAL.

The appellant Paul Fix was born at Haslach, Germany, on January 26, 1905. He worked as a farmer in Germany and had an education equivalent to graduation from high school and subsequent trade school. He entered the United States in December, 1928. (R. 77.)

He began learning the baker's trade in San Francisco in 1929, and except for a period in 1930, when he made four or five coastwise trips as a seaman, and another period in 1939, when he operated a restaurant and saloon for four or five months, he has followed the occupation of baker since that time. (R. 78-79-80.)

He was first married in San Francisco in 1930 to Mary Winkler, who died in 1932. His only child, a son, an issue of this marriage, was given away for adoption at the age of four months. (R. 80-81-82-83.)

His second marriage was to Meta Schlegel which marriage was terminated by divorce some six years later. (R. 83-84.) His third and present marriage to Thelma Fix, occurred in 1942. (Tr. 83-84.)

Appellant filed his declaration of intention to become a citizen of the United States on June 29, 1929 and was naturalized on January 6, 1936. (R. 75.)

Appellant made a trip to Germany, departing from the United States about March 1, 1937 and returning in late August or early September of the same year. (R. 84-85.) The trip to Germany was, according to appellant, for the purpose of visiting his folks and to see the folks of his third wife, who accompanied him on the trip. (R. 85.)

Appellant began his bakery at LaFayette, California, where he has since been located, in October, 1941. (R. 45.)

When questioned concerning his first association with the Friends of New Germany and the German-American Bund, the appellant was apparently evasive in his answers, causing the Court to ask him certain direct questions and to direct him to answer the questions. (R. 88, 98.) Appellant testified that he was first associated with the Friends of New Germany in 1934, (R. 91) *this being about two years prior to the date of his naturalization*. However, according to his testimony, appellant did not recall seeing flags, banners, swastikas or uniforms at that time (R. 91). He stated that he had only attended one meeting of the Friends of New Germany. (R. 90.) Appellant could not recall whether his first association with the German-American Bund was before or after his trip to Germany. (R. 85.) However, he did state that he thought it was late in 1936 when he went to one or two meetings. (R. 85.)

Appellant formally joined the German-American Bund in 1938 or 1939 and paid dues for a period of three months. (R. 86-87, 93.)

Appellant testified that he might have seen some of the propaganda moving pictures at Bund meetings in 1936 and that he definitely saw others after his return from Germany in 1937. (R. 92.) Appellant had a membership card issued to him in the German-American Bund. (R. 93.) He knew Gottfried Hein, but not personally, and Henry Lage, but did not remember Heilman nor Otto Wiedemann nor Julius Schmidt. (R. 94.) Appellant testified that at the meeting halls of the German-American Bund, he saw a phonograph and the American flag. On occasions he saw the swastika flag. He also saw a table on which were placed German newspapers, but could not recall their names. (R. 95.)

Appellant testified that he never wore the O. D. (Ordnungs Dienst) uniform, but had seen members of the German-American Bund in uniform. (R. 97-98.) He testified that when he joined the German-American Bund, he knew there was a uniformed group, but did not recall the arm bands and swastikas. (R. 99.) He knew of the "leadership principle" of the Bund, but could not recall any specific time at which it had been discussed. (R. 100.) *He said he left the Bund because of personal differences with Gottfried Hein. (R. 100-101.)* He does not claim that he quit the Bund because he did not agree with their principles, practices and theories.

Appellant stated that he joined the German-American Bund because of business reasons, i. e., they purchased bakery goods from him for use as refreshments following meetings. (R. 101.)

When questioned as to whether he knew the principles of the German-American Bund at the time he joined, appellant answer was "yes and no." (R. 102.) Appellant testified that he could not recall as to whether he knew the requirements for membership in the German-American Bund (R. 102); testified that he did not recall hearing of the blood theory nor anything specific about Adolf Hitler or National Socialism. (R. 106-107.) He testified that he could not remember having seen the Nazi salute and that he never gave the Nazi salute himself (R. 107) (as testified to by witness Jessen in the consolidated case, R. 391).

Appellant was in attendance at the Dublin Canyon picnic in 1938, at which time a large swastika was burned on the hillside. He also attended the Gautag West convention in Los Angeles in 1939, having driven in his car and taken other Bund members to attend this convention of Bund organizations on the west coast. (R. 115.)

At first he did not recall having signed a telegram to Senator Johnson from this convention. (R. 116-117.) This telegram was later introduced in evidence as Government's Exhibit 3. (R. 133.) After some discussion he admitted that he had signed a transcript of a statement made to an officer of the Federal Bureau of Investigation, which statement was introduced as U. S. Exhibit 2. (R. 117-8-9-20.) The statement in full reads as follows:

“LaFayette, California
February 9, 1943.

“I, Paul Fix, voluntarily make this statement to Charles F. Bruschi and Edward W. Butler, Jr., Special Agents, Federal Bureau of Investigation. No threats or promises have been made to me and I know this statement may be used in court.

I was born January 26, 1905, in Germany, entered the United States in 1928 and was naturalized at San Francisco in 1936.

From 1934 to 1937, when I took a trip to Germany, I attended one or two affairs of the Friends of New Germany and may have made a donation to the organization.

From the time I returned from Germany in the later part of 1937 until the later part of 1939 I attended affairs of the German-American Bund at least on the average of twice a month. At these affairs I heard numerous lectures on the merits of National Socialism. I recall seeing the German swastika flag displayed, the outstretched arm salute given, and the Horst Wessel Lied sung. I have read many times the German-American Bund newspaper, the Deutsches Weckruf und Beobachter, and the Free American, which was distributed at meetings. I recall seeing the Oudnungs Dienst in uniform. I recall seeing Herman Schwinn and Fritz Kuhn, national leaders, at meetings in San Francisco and Los Angeles. I attended the Sonnenwendefeier at Dublin Canyon June, 1938, when the swastika in the hillside was burned.

In September, 1939, at the request of Herbert Landes and Hartwig Reese, I drove my car to

Los Angeles and took several San Francisco Bund members to the Gautag West (Western District Convention). I recall that George Ordemann also drove his car on this occasion. I recall the following Bund members attending the convention with me: Gottfried Karl Hein, George Ordemann, Erwin Mast, Hartwig Reese, Alfred Boehme and Herbert Landes.

At the convention a group telegram was sent to Senators and Congressmen in Washington, urging that the United States remain neutral in the European conflict. I may have subscribed to this telegram and received a reply back from Senator Hiram W. Johnson, addressed to me personally.

According to my best recollection the persons who rode with me to Los Angeles paid me for transportation out of their own funds.

I have read this two-page statement and have signed it after initialing the first page.

Paul Fix.

Witnesses: Charles F. Brusch,
Special Agent, F.B.I.
Edward W. Butler, Jr.,
Special Agent FBI."

(R. 122-3-4.)

The appellant stated that while operating the Elite Cafe in 1938 and 1939, he instructed a group of Bund members, who were in his restaurant, not to discuss political matters in the restaurant. Appellant knew these persons were members of the Bund although the Bund was supposed not to have existed at that time. (R. 127-8-9-30.)

Government witness William C. McClure testified that he had worked for Fix as a baker in LaFayette from February, 1942 to August, 1942. (R. 144.) While working for appellant, this witness heard appellate state that President Roosevelt and his cabinet were warmongers. When soldiers passed appellant stated: "There goes the condemned row, they are going off to slaughter." (R. 145.) Mr. Fix stated to witness that he did not want any war bonds; that they would be no good after the war. (R. 146.) Appellant told witness that Germany would win the war; that the gold at Fort Knox would be melted into German marks and that American money would have no value. (R. 146.) Appellant told witness that he would not give the s. o. b.'s anything for salvage or scrap. (R. 147.) He said that he would rather sit in the guard-house than go into the United States Army. (R. 148.) The witness testified that appellant described Jews generally as "sons of bitches and bastards," (R. 150.) and that the United States should have the German national system rather than our own form of government. (R. 152.)

Government witness Mrs. Rose Levick testified that Paul Fix roomed at her home from April to July, 1940. After defendant left she discovered among his effects a German army rifle, a German gas gun and a loaded .22 rifle. (R. 174.) Among the phonograph records in appellant's possession was one in which the chorus was all "Heil Hitler." While residing in her home appellant received mail from Bund headquarters telling of meetings, but told witness that he did

not belong. (R. 174.) Appellant told witness that Germany was going to take over the United States and was prepared to do so. He further stated that German people here were armed and ready at a given signal to dispose of the Jews and that General Mosley was to be headman in a government here which would be the same as that in Germany. (R. 175.) Mr. Fix told her that the gas gun was a secret of the Germans. (R. 179.)

Government witness Ada Levick, daughter of the preceding witness, testified that Fix told her that all Americans unions should be broken as they have been in Germany; that the Germans would take over America; that they were armed and prepared here; that General Mosley would be the leader and that the Jewish people would be wiped out. (R. 181.) She also saw the guns described by the previous witness, Mrs. Rose Levick, and testified that the .22 rifle was loaded. (R. 182.)

Government witness James Richard Montgomery, who first became acquainted with appellant Fix at LaFayette after 1941, testified that Fix told him: "If Roosevelt had kept his big mouth shut, the United States would not be in the war," (R. 185.)

Government witness Emmet R. Howard testified that on the return of appellant Fix from Germany in 1937 or 1938, appellant stated: "We may need a Hitler here to change our conditions." (R. 200.)

THE ISSUE.

The basic issue raised by the appellant is the contention that the evidence in the case does not support the findings of the Court.

In that connection due consideration must be given the opinions in the Supreme Court in the cases of *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333; 87 L.Ed. 1796, rehearing denied 64 S.Ct. 24, 320 U.S. 807, 88 L.Ed. 488; *Baumgartner v. United States*, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525; *Knauer v. United States*, 328 U.S. 654, 66 S.Ct. 1304, 90 L.Ed. 1195;

and the recent case of

Kuehn v. United States, 54 F.Supp. 63, 162 F. (2d) 716; cert. denied 332 U.S. 837.

It will be noted that the Supreme Court distinguished the case of *Knauer v. United States*, supra, from the cases of *Schneiderman v. United States*, supra, and *Baumgartner v. United States*, supra. It will be further noted that the decision in the case of *Kuehn v. United States*, supra, in the Ninth Circuit, follows the decision in *Knauer v. United States*.

It is the contention of the Government that there is ample evidence to sustain the findings of the District Court. The Court made certain findings as to the aims, purposes and doctrines of the German-American Bund and its predecessor organizations. These are fully set forth in the appendix to this brief.

In its Conclusions of Law based on the Findings of Fact, the Court found that in carrying out the

activities set forth in its Findings of Fact (see appendix) and in seeking to accomplish its real aims and purposes, the Bund demonstrated itself to be a German militant "Fifth Column" organization in the United States, antagonistic to the democratic form of government and to the Constitution and laws of the United States, un-American and subversive. The Court held that one who believed in the National Socialist philosophy and form of government, cannot at the same time be loyal to the United States nor attached to the principles of the Constitution and laws of the United States. In addition thereto, the Court made certain specific findings of fact as to appellant's individual case, which findings are set forth in the appendix.

ARGUMENT.

Appellee concedes that in a denaturalization proceeding the burden is on the Government to prove its case by clear, unequivocal and convincing evidence. The appellee contends, however, that under the decision of the United States Supreme Court in the case of

Knauer v. United States, 328 U.S. 654, 66 S.Ct. 1304, 90 L.Ed. 1195,

and the decision of this Court in the case of

Kuehn v. United States (decided July 28, 1947), 162 F.(2d) 716; rehearing denied August 25, 1947; certiorari denied December 8, 1947, 332 U.S. 837,

the appellee has met the test of establishing his case by clear, unequivocal and convincing evidence that said appellant procured the issuance of a certificate of naturalization by fraud.

Let us start with the premise that the granting of citizenship through the process of naturalization is a privilege and not a right. In the case of

Johannessen v. United States, 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066,

at page 240, the Court quoted from the case of *United States v. Spohrer*, 175 Fed. Rep. 440. The language used by Judge Cross in that case regarding the right of an alien to naturalization, is as follows:

“An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not, he takes nothing by his paper grant. Fraud cannot be substituted for facts.”

And again, on page 446,

“That the government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is, in my judgment, well settled, and if

that be true of property, then by analogy and with greater reason it would seem to be true where it has conferred a privilege in answer to the prayer of an ex parte petitioner.”

The Supreme Court makes a distinction between the measure of proof that is necessary to deny a petition for citizenship under Section 4 of the Act of June 29, 1906 (36 Stat. 598) and the degree of proof necessary to cancel a citizenship for fraud under Section 338 (a) of the Nationality Act of 1940.

In the first class of cases the Court placed on the petitioner for citizenship the burden of proving his eligibility therefor. In the second class of cases, the cancelling of a certificate of citizenship secured by fraud placed the burden on the Government.

Schneiderman v. United States, supra;

Baumgartner v. United States, supra;

Klapprott v. United States (decided January 17, 1949, and reported Supreme Court Law Ed. advance opinion 279).

The courts have uniformly held that an alien fraudulently naturalized, should not be permitted to retain the fruit of his fraud, and will cancel a certificate of naturalization fraudulently obtained.

In *Johannessen v. United States*, supra, the Court said, at page 241:

“An alien has no moral or constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the Court, without which the certificate

of citizenship could not and would not have been issued. As was well said by Chief Justice Parker in *Foster v. Essex Bank*, 16 Mass. 245, 273, 'there is no such thing as a vested right to do wrong.' "

In

Luria v. United States, 231 U.S. 9, 34 S.Ct. 10,
58 L.Ed. 101,

at page 24, the Court quoting from *Johannessen v. United States*, supra, said:

"Several contentions questioning the constitutional validity of Section 15 are advanced, but all, save the one next to be mentioned, are sufficiently answered by observing that the section makes no discrimination between the rights of naturalized and native citizens, and does not in any wise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings; of merely colorable letters of citizenship, to which their possessors never were lawfully entitled."

U. S. v. Ginsberg, 243 U.S. 472, 37 S.Ct. 422,
61 L.Ed. 853;

Tutun v. United States, 270 U.S. 568, 46 S.Ct. 425, 70 L.Ed. 738;

United States v. Ness, 245 U.S. 319, 8 S.Ct. 118,
62 L.Ed. 321.

Constitutional rights are not endangered by the provision authorizing cancellation of certificate of one taking up a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship.

Luria v. U. S. (N. Y. 1913), 34 S.Ct. 10, 231 U.S. 9, 58 L.Ed. 101, affirming *U. S. v. Luria* (D. C. 1911) 184 Fed. 643;

Section 338 of the Nationality Act of 1940;

Title 1, subchapter III, 54 Stat. 1158, Title 8 U.S.C.A. Sec 738.

This section authorizing the revocation of a certificate of naturalization procured by fraud is constitutional, whether fraud be intrinsic or extrinsic.

U. S. v. Siegel (Conn. 1945), 59 F.Supp. 183, 152 F. (2d) 614; cert. denied, 66 S. Ct. 1361, 328 U.S. 868, 90 L.Ed. 1264.

This same section authorizing the revocation of a certificate of naturalization on the ground that it was illegally procured, does not constitute legislative usurpation of judicial power.

U. S. v. Gallucci (D.C. Mass. 1944), 54 F.Supp. 964.

The provision for the cancellation of certificates of citizenship under the Act of June 29, 1906, applied not only to certificates issued then, but to all certificates heretofore issued by Court exercising jurisdiction in naturalization proceedings.

In its opinion in the case of

Schneiderman v. United States, supra,

the Supreme Court began using the words "clear, unequivocal and convincing" as to the degree of proof required for the cancellation of a certificate of naturalization procured by fraud. It was the first case in that Court wherein it was called upon to decide what evidence was necessary to sustain the cancellation of a certificate of naturalization on the ground that at the time of taking his oath of allegiance to the United States, the naturalized alien had made a mental reservation of an allegiance to another sovereign. The Court endeavored in this case to determine the state of mind of the petitioner for certiorari at the time of his taking the oath of allegiance to citizenship of this country, and decided that in such cases the degree of proof would have to be of a nature which it indicated, "clear, unequivocal and convincing." The Court failed to make definite what it regarded as meeting this degree of proof in particular cases.

This case was followed in that Court by that of

Baumgartner v. United States, supra,

wherein the Court reiterated that the degree of proof necessary for the cancellation of a certificate of naturalization under Section 338(a) of the Nationality Act of 1940 was that such proof must be clear, unequivocal and convincing. In this case the Court was also called upon to pass upon the state of mind of the petitioner for certiorari, Baumgartner, at the time of his naturalization. The Court, in commenting on the state of mind of petitioner at the time he took the oath of allegiance, stated (page 677) :

“In short, the weakness of the proof as to Baumgartner’s state of mind at the time he took the oath of allegiance can be removed, if at all, only by a presumption that disqualifying views expressed *after naturalization* were accurate representations of his views when he took the oath. The logical validity of such a presumption is at best dubious even were the supporting evidence less rhetorical and more conclusive. Baumgartner was certainly not shown to have been a party Nazi, and *there is only the statement of one witness that Baumgartner had told him that he was a member of the Bund, to hint even remotely that Baumgartner was associated with any group for the systematic agitation of Nazi views or views hostile to this government.* On the contrary Baumgartner’s diary, on which the Government mainly relies reveals that when in 1939 he attended a meeting of the German Vocational League at which the Nazi salute was given, it was apparently his only experience with this group, and he went ‘Since I wanted to see what sort of an organization this Vocational League was,’ ”

and on page 676, the Court said:

“The insufficiency of the evidence to show that Baumgartner did not renounce his allegiance to Germany in 1932 need not be labored. Whatever German political leanings Baumgartner had in 1932, they were Hitler and Hitlerism, certainly not to Weimar Republic. Hitler did not come to power until after Baumgartner forswore his allegiance to the then German nation.”

Owing to the uncertainty as to what constituted this degree of proof the Supreme Court granted a writ

of certiorari to the Circuit Court of Appeals for the Seventh Circuit in the case of

Knauer v. United States, 328 U.S. 654, 90 L.Ed. 1195.

In this case the District Court had cancelled a certificate of naturalization and revoked the order admitting Knauer to citizenship on the ground that same had been procured by fraud. The Circuit Court of Appeals for the Seventh Circuit affirmed this opinion. (149 F.(2d) 519.) The Supreme Court granted certiorari.

The facts in this case were as follows: Knauer was a native of Germany. He arrived in this country in 1925 at the age of 30. He had served in the German army during World War I and was decorated. He had studied law and economics in Germany. He settled in Milwaukee, Wisconsin, and conducted an insurance business there. He filed his declaration of intention to become a citizen in 1929 and his petition for naturalization in 1936. He took his oath of allegiance and was admitted to citizenship on April 13, 1937. In 1943 the United States instituted proceedings under Section 338(a) of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U.S.C. Sec. 738(a), to cancel his certificate of naturalization on the ground that (1) he had falsely and fraudulently represented in his petition that he was attached to the principles of the Constitution and (2) that he had taken a false oath of allegiance. The District Court was satisfied that Knauer practiced fraud when he obtained his certificate of naturalization. It found that he had not been and was not attached to the principles of the Con-

stitution and that he took a false oath of allegiance. It accordingly entered an order cancelling his certificate and revoking the order admitting him to citizenship.

The Circuit Court of Appeals affirmed the lower court (149 F.(2d) 519). The case was before the United States Supreme Court on a petition for writ of certiorari which was granted to examine that ruling in the light of the decisions of that Court in

Schneiderman v. United States, 320 U.S. 118,
and

Baumgartner v. United States, 322 U.S. 655.

In the oath of allegiance which Knauer took, he swore that he would "absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to the German Reich"; that he would "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic"; that he would "bear true faith and allegiance to the same" and that he took "this obligation freely without any mental reservation or purpose of evasion." The first and crucial issue in the case was whether Knauer swore falsely and committed a fraud when he promised under oath of forswear allegiance to the German Reich and to transfer his allegiance to this nation.

The Supreme Court examined the facts to determine whether the United States had carried its burden of proving by "clear, unequivocal and convincing" evidence, which does not leave the issue in doubt, that

the citizen who is sought to be restored to the status of an alien obtained his naturalization illegally.

The Court endeavored to discover the state of mind of Knauer *at the time he swore falsely* on April 13, 1937, the date he took the oath of allegiance to the United States. The Court stated that as in the *Baumgartner* case utterances made in years subsequent to the oath, are not readily to be charged against the state of mind existing when the oath was administered. (322 U.S. 675.) Troubled times and the emotions of the hour may elicit expressions of sympathy for old acquaintances and relatives across the waters. "Forswearing past political allegiance without reservation and full assumption of the obligations of American citizenship are not at all inconsistent with cultural feelings imbedded in childhood and youth." (*Baumgartner v. U.S.*, *supra*, p. 674.)

Human ties are not easily broken. Old social and cultural loyalties may still exist, though basic allegiance is transferred here. The fundamental question is whether the new citizen still takes orders from or owes his allegiance to a foreign chancellory. Far more is required to establish that fact than a showing that social and cultural ties remain. And even political utterances, which might be some evidence of a false oath, if they cluster around the date of naturalization, are more and more unreliable as evidence of the perjurious falsity of the oath the further they are removed from the date of naturalization.

Both the District Court and the Circuit Court of Appeals accepted as the true version of the facts, the following:

As early as 1931, Knauer told a newly arrived immigrant who came from the same town in Germany that, in his opinion, the aim of Hitler and the Nazi party was good, that it would progress, and that it was necessary to have the same party in this country because of the Jews and the Communists. During the same period he told another friend repeatedly that he was opposed to any republican form of government and that Jewish capital was to blame for Germany's downfall. He visited Germany for about six months in 1934 and while there read Hitler's "Mein Kampf." On his return he said, with pride, that he had met Hitler and that he had been offered a post with the German Government at 600 marks per month; that Hitler was the savior of Germany, that Hitler was solving the unemployment problem while this country was suffering from Jewish capitalism; that the Hitler youth organization was an excellent influence on the children of Germany. On occasions in 1936 and 1937, he was explosive in his criticism of those who protested against the practices and policies of Hitler.

The German Winter Relief Fund was an official agency of the German Government for which German consulates solicited money in the United States. In the winter of 1934-1935, Knauer was active in obtaining contributions to the fund and forwarded the money collected to the German consulate in Chicago.

The German-American Bund had a branch in Milwaukee. Its leader was George Froboese, midwestern gauleiter and later national leader. The Bund taught and advocated the Nazi philosophy, the leadership principle, racial superiority of the Germans, the principle of the totalitarian state, Pan-Germanism and of Lebensraum (living space). It looked forward to the day when the Nazi form of government would supplant our form of government. It emphasized that allegiance and devotion to Hitler were superior to any obligation to the United States. Knauer denied that he was a member of the Bund, but the District Court found to the contrary on evidence which was solid and convincing.

Knauer participated in Bund meetings in 1936. In the summer of 1936 he and his family had a tent at the Bund camp. In the fall of 1936 he enrolled his young daughter in the Youth Movement of the Bund, a group organized to instill the Nazi ideology in the minds of children of German blood. They wore uniforms, used the Nazi salute, and were taught songs of allegiance to Hitler. Knauer attended meetings of this group.

The Federation of German-American Societies represented numerous affiliated organizations composed of persons of German descent and sought to coordinate their work. It was the policy of the Bund to infiltrate older German societies. This effort was made as respects the federation. Knauer assisted Froboese and others between 1933 and 1936 in endeavoring to have the swastika displayed at celebrations of

the federation. In 1935, Knauer reprimanded a delegate to the federation for passing out pamphlets opposing the Nazi Government in Germany. At a meeting of the federation in 1935, Knauer moved to have the federation recognize the swastika as the flag of the German Reich. The motion failed to carry. In 1936 the swastika flag was raised at a German day celebration without approval of the federation. A commotion ensued in which Bundists in uniform participated, as a result of which the swastika flag was torn down. At the next meeting of the federation Knauer proposed a vote indicating approval of the showing of the swastika flag. The motion failed and a vote of censure of the chairman was passed. The chairman resigned. Thereupon Froboese and others proposed the formation of the German-American Citizens Alliance to compete with the federation. It was organized early in 1937. The constitution and articles of incorporation of the alliance provided that all of its assets on dissolution were to become the property of a German Government agency for the dissemination of propaganda in foreign countries, the Deutsches Auslands-Institut. The alliance was a front organization for the Bund. It was designed to bring into its ranks persons who were sympathetic with the objectives of the Bund but who did not wish to be known as Bund members.

On February 22, 1937, *less than two months before Knauer took his oath of naturalization*, he was admitted to membership in the alliance and became a member of its executive committee. His first action

as a member was to volunteer the collection of newspaper articles that attacked the alliance, Germany and German-Americans. In 1937, and in the ensuing years Knauer wrote many letters and telegrams to those who criticized the Bund or the German Government. In 1938 Knauer was elected vice-president of the alliance and subsequently presided over most of its meetings. He was the dominant figure in the alliance. In May, 1937, the German consul presented to the alliance the swastika flag which had been torn down at the federation celebration the year before. Not long after his naturalization Knauer urged that the alliance sponsor a solstice ceremony, a solemn rite at which a wooden swastika was burned to symbolize the unity of the German people everywhere. In August, 1937, the alliance refused to participate in an affair sponsored by a group which would not fly the swastika flag. In May, 1938, Knauer at a meeting of the alliance read a leaflet entitled "America, the Garbage Can of the World". In 1939 he arranged for public showings of films distributed by an official German propaganda agency and depicting the glories of Nazism.

There was an intimate cooperation between the alliance and the Bund. The Bund camp was used for alliance affairs and it was available to alliance members. The alliance supported various Bund programs. It supported the Youth Group of the Bund and the Bund's solstice celebration. In 1939 the Youth Group of the Bund held a benefit performance for the alliance. In 1940 it admitted the Youth Group of the Bund at

the request of Froboese. Knauer consistently defended the Bund when it was criticized, when it was denied the use of a park or hall, when its members were arrested or charged with offenses. In spite of the fact that Knauer knew the real aims and purposes of the Bund and was aware of its connection and Froboese's connection with the German Government, he consistently came to its defense. Thus, when a Wisconsin judge freed disturbers of a Bund meeting, he wrote the judge saying that the judge's remarks against the Bund were a "slander of a patriotic American organization." He subscribed to the official Bund newspaper and to a propaganda magazine issued and circulated by an agency of the German Government. He held shares in the holding company of the Bund camp which was started in 1939. A photograph taken at the dedication of the new Bund camp in 1939 shows Knauer among a group of prominent Bund leaders with arm upraised in the Nazi salute. He owned a cottage at the Bund camp. He used the Nazi salute at the beginning and end of his speeches and at the Bund meetings.

In May, 1938, Knauer and Froboese formed the American Protective League with a secret list of members. Knauer was elected a director. A constitution and by-laws were adopted and copies mailed by Knauer and Froboese to Hitler. One Buerk was a German agent operating in this country and later indicted for failing to register as such. In 1939 the German consulate in Chicago supervised the recruiting of skilled workers in that region for return to

Germany for work in German industries. The German consul, Buerk, Froboese and Knauer conducted the recruiting. Knauer participated actively in interviewing candidates. At intervals farewell parties were given by Knauer and Froboese to the returning workers and their families.

Important evidence implicating Knauer in promoting the cause of Hitler in this country was given by a Mrs. Merton. She testified that, prompted solely by patriotic motives, she entered the employ of Froboese in 1938 in order to obtain evidence against the Bund and its membership. The truth of her testimony was vigorously denied by Knauer. But the District Court believed her version as did the Circuit Court of Appeals. The Court felt that her testimony was strongly corroborated and that Knauer's attempt to discredit her testimony did not ring true.

Her testimony may be summarized as follows:

She acted as secretary to Froboese in 1938. During the period of her employment Froboese and Knauer worked closely together on Bund matters. He helped Froboese in the preparation of articles for the Bund newspaper, of speeches, and of Bund correspondence. He helped Froboese prepare resolutions to be offered at the 1938 Bund convention calling for white-gentile-ruled America. When Froboese left the city to attend the convention, he told her to contact Knauer for advice concerning Bund matters. Letters signed by Froboese and Knauer jointly were sent to Hitler and other Nazi officials. One contained a list of 700 German nationals. One was the constitution and by-laws

of the American Protective League which we have already mentioned. One to Hess said they had to lay low for awhile, that there was an investigation on. A birthday greeting to Hitler from Froboese and Knauer closed with the phrase, "In blind obedience we follow you." Knauer told her never to reveal that the alliance and the Bund were linked together. One day she asked Knauer what the Bund was. His reply was that the Bund "was the Fuehrer's grip on American democracy." She reminded Knauer that he was an American citizen. He replied, "That is a good thing to hide behind."

On page 668 of the opinion in the *Knauer* case, the Court made the following statement:

"Moreover, the case against Knauer is not constructed solely from his activities subsequent to April 13, 1937—the date of his naturalization. The evidence prior to his naturalization, that which clusters around that date, and that which follows in the next few years is completely consistent. It conforms to the same pattern. We do not have to guess whether subsequent to naturalization he had a change of heart and threw himself wholeheartedly into a new cause. We have clear, convincing and solid evidence that at all relevant times he was a thoroughgoing Nazi bent on sponsoring Hitler's cause here. And this case, unlike the Baumgartner case, is not complicated by the fact that when the alien took his oath Hitler was not in power. On April 13, 1937, Hitler was in full command. The evidence is most convincing that at that time, as well as later, Knauer's loyalty ran to him, not to this country."

On page 669 of its opinion, the Court distinctly set forth that its view in this case was different than the *Schneiderman* and *Baumgartner* cases. The Court said:

“The district Court properly ruled that membership in the Bund was not in itself sufficient to prove fraud which would warrant revocation of a decree of naturalization. Otherwise, guilt would rest on implication, contrary to the rule of the *Schneiderman* and *Baumgartner* cases. But we have here much more than that. We have a clear course of conduct, of which membership in the Bund was a manifestation, designed to promote the Nazi cause in this country. This is not a case of an underling caught up in the enthusiasm of a movement, driven by ties of blood and old associations to extreme attitudes, and perhaps unaware of the conflict of allegiance implicit in his actions. Knauer is an astute person. He is a leader—the dominating figure in the cause he sponsored, a leading voice in the councils of the Bund, the spokesman in the program for systematic agitation of Nazi views. His activities portray a shrewd, calculating and vigilant promotion of an alien cause. The conclusion seems to us plain that when Knauer forswore allegiance to Hitler and the German Reich he swore falsely.”

Again, on page 670 of the same opinion, the Court stated:

“We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization. Those facts relate to the past—

to behavior and conduct. But the oath is in a different category. It relates to a state of mind and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen. It requires forswearing of allegiance in good faith and with no mental reservations. The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant for citizenship. Hence no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true was in fact false. Hence, the issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated.”

“Moreover, when an alien takes the oath with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by deceit. The proceeding itself is then founded on fraud. A fraud is perpetuated on the naturalization court.”

And, on page 674 of the same opinion, the Court said:

“We adhere to the prior rulings of this Court that Congress may provide for the cancellation of certificates of naturalization on the ground of fraud in their procurement and thus protect the courts and the nation against practices of aliens who by deceitful methods obtain the cherished status of citizenship here, the better to serve a foreign master.”

Recently, in the case of

Klapptropp v. United States (decided by the Supreme Court on January 17, 1949), reported in 93 S.Ct. Law. Ed. Advance Opinion 279,

the Court reiterated its statement in the *Scheiderman* and *Baumgartner* cases, that "clear, unequivocal and convincing" evidence was necessary to deprive a naturalized citizen of his citizenship.

It seems clear from the decision of the Supreme Court that mere membership in an organization, such as the Bund, per se is not sufficient cause for the cancellation of a certificate of citizenship.

Schneidermann v. United States, supra;

Baumgartner v. United States, supra;

Knauer v. United States, supra;

Klapptropp v. United States, supra.

The Court defined what is meant by "clear, unequivocal and convincing" evidence of fraud. In so doing it provided a yardstick of measure as to when "clear, unequivocal and convincing" evidence of fraud has been established in a denaturalization case. For this reason these facts in the *Knauer* case have been heretofore set forth at length.

Appellant takes no exception in his brief to Findings of Fact by the lower court from No. I to No. XI, inclusive, which facts are fully supported by the evidence as shown in our factual statement of the case.

As to Findings of Fact No. XII (R. 32), the Court found in substance, that sworn oaths of appellant, in

his petition for naturalization and in his oath of allegiance at the date of naturalization, as set forth in the complaint, were then and there false, fraudulent and illegal in that the appellant, at the time of taking said oaths, did not, in fact, absolutely and entirely renounce and abjure all allegiance and fidelity to Germany and the German Reich (R. 32) but in fact intended to and did secretly reserve and retain allegiance and fidelity to Germany and the German Reich; nor did appellant at the time he took said oaths intend to support the Constitution and laws of the United States of America against all enemies, foreign and domestic, but in fact, said appellant then and there secretly reserved his intention not to support and defend the Constitution and laws of the United States of America against Germany and the German Reich should they become enemies of the United States of America; nor did the appellant at the time of taking said oaths intend to bear true faith and allegiance to the United States of America, but in fact, secretly reserved and retained his intention not to bear true faith and allegiance to the United States of America; that by taking said oaths falsely, with the secret mental reservation and intention, as aforesaid, the appellant deceived the United States, its officers and agents, and the said naturalization court at the date of his admission to citizenship in order that said appellant might obtain the rights, privileges and protection of citizenship in the United States of America.

As to Findings of Fact No. XIII (R. 33) the Court found, in substance, that prior to, at the time of, and at all times subsequent to his naturalization, the appellant was acquainted with, sympathized and agreed with the aims, purposes and doctrines of the German-American Bund.

As to Findings of Fact No. XIV (R. 33) the Court found, in substance, that on the date of appellant's petition for naturalization, and at all times subsequently, the appellant's allegiance has been to Germany rather than to the United States, and his attachment has been to National Socialism rather than to the principles of the United States Constitution. His lack of allegiance to the United States and his lack of attachment to the principles of the Constitution had not changed or varied in the interval since his naturalization, and his attitude in these respects was the same when he was naturalized as in subsequent years up to the date of the trial.

It is submitted that upon consideration of the entire record in this case, which has been set forth heretofore in detail, and upon consideration of Findings of Fact Nos. I to XI, inclusive, as made by the Court, Findings of Fact Nos. XII, XIII, and XIV, are fully justified by the record herein and are the only findings of fact which the Court could properly make on these points.

As the evidence, in the opinion of the appellee, is sufficient to justify all the findings of fact made by the Court below, it necessarily follows that the Con-

clusions of Law made by the Court (R. 34) were correct.

As it appears that there was ample evidence presented to the Court to sustain the Findings of Fact and Conclusions of Law and that the facts in this case are somewhat analogous to those in the case of *Knauer v. United States*, supra, it is respectfully urged that the decision of the Court below should be affirmed.

Dated, San Francisco, California,
April 1, 1949.

FRANK J. HENNESSY,
United States Attorney,
EDGAR R. BONSALE,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.



Appendix

In Section 4, Act of June 29, 1906 (34 Stat. 598) it is provided:

“It shall be made to appear to the satisfaction of the Court admitting any alien to citizenship that immediately preceding the date of his application, he has resided continuously within the United States 5 years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence and occupation of each witness shall be set forth in the record.”

Section 338(a) of the Nationality Act of 1940 (Title 8 U.S.C.A. 738) provides:

“It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground

that such order and certificate of naturalization were illegally procured.

**FINDINGS AND CONCLUSIONS AS TO THE COMMON
ISSUE (MENTIONED IN APPELLANT'S BRIEF STATE-
MENT OF THE CASE, p. 4).**

I.

In or about October, 1924, there was organized in Chicago, Illinois, the "Free Society of Teutonia" which, by subsequent changes of name, became known in 1926 as the "National Socialist Society of Teutonia", in 1932 as the "Friends of the Hitler Movement", in June, 1933 as the "Bund Freunde des Neuen Deutschland" or the "Bund Friends of the New Germany", and in March, 1936 as the "Amerika-Deutscher Volksbund" or "German-American Bund". The term "the Bund" is used to designate the organization at all times from and after June 30, 1933.)

II.

On or about June, 1933, local units of the National Socialist German Workers Party (commonly known as the "Nazi Party" or the "N. S. D. A. P.") then and theretofore existing in the United States ostensibly dissolved and associated themselves with and became amalgamated in the Bund.

III.

The Bund was active openly in the United States and operated until about the date of the declaration of war on December 8, 1941.

IV.

The Bund was an incorporated membership association in which membership was limited by the rules of the organization to persons of "Aryan" descent (as defined by the Nazi Party), free from Negro or Jewish blood. The membership was made up almost entirely of persons of German descent.

V.

The Bund, and each of the organizations mentioned in Paragraphs I and II hereinabove, was organized and conducted for German National Socialistic purposes, and was connected with and controlled in thought and action by the Nazi Party in Germany. In its organization and in its activities the Bund modeled itself upon and imitated the Nazi Party.

VI.

The constitution of the Bund as adopted in or about 1935, and as from time to time revised and published was false and misleading and designed to blind the American public to the true aims and purposes of the organization, which was dedicated to the accomplishment of the aims and purposes in the United States of German National Socialism, as expounded by Adolph Hitler and the Nazi Party.

VII.

The Bund stood for and taught the proposition that all people of German extraction were members of the German "Volk"; that no member of the "Volk" could ever be absorbed in or by any other nationality

or race; and that every member of the "Volk", regardless of what citizenship he might have acquired or derived in any other country, owed allegiance to Germany. That proposition is basic in the philosophy of the Nazi Party.

VIII.

The Bund stood for and taught that the German "Volk" was supreme over all other nationalities or races. That proposition is basic in the philosophy of the Nazi Party.

IX.

The Bund was conducted in accordance with the so-called "leadership principle", under which unquestioned obedience is owed to the leader. The leadership principle is a basic tenet of German National Socialism and is entirely inconsistent and at odds with the democratic concept of government. The Bund taught that under the leadership principle all persons of German extraction, as members of the German "Volk", owed obedience to the leader of the German nation who, from and after January, 1933, was Adolf Hitler.

X.

The Bund sought to instill and foster in United States citizens of German extraction a loyalty and allegiance to the "homeland" or "Vaterland"—Germany—thus to create in such citizenry a divided loyalty inconsistent with full and undivided allegiance to the United States owed by a citizen thereof.

XI.

The Bund taught that all people of "German" blood in the United States, regardless of their citizenship must serve the interests of Germany first, even though those interests might conflict with the interests of the United States.

XII.

The Bund attempted to create dissension among the people of the United States by urging discrimination against certain persons and groups of persons, for reasons of race, color or creed.

XIII.

At various times the Bund, or its predecessor, organizations named in Paragraph I hereinabove, published and distributed the following newspapers: "Das Neue Deutschland", "Deutsche Zeitung", "Deutscher Beobachter", "Deutscher Weckruf und Beobachter", and "Deutscher Weckruf and Beobachter and Free American". Each of such newspapers was the official organ of the organization at the time of its publication. Each of the newspapers was designed and used to disseminate the philosophy and precepts of German National Socialism in the United States, to foster in the readers thereof an allegiance to Germany and to the Nazi Party, and to incite in the readers thereof a contempt for democratic institutions and the government of the United States. The contents of such newspapers were Nazi-inspired, and in a large part the source material of the contents was secured by

the Bund or its predecessor organizations from propaganda agencies in Germany controlled by the Nazi Party.

XIV.

The Bund received Nazi propaganda material from such agencies as the Rassen Politische Auslands Korrespondentz (R. A. K.), Dienst Aus Deutschland, the Fichtebund, Volksbund fuer des Deutschtum im Ausland (V. D. A.), and Deutscher Auslands Institut (D. A. I.). Such material was disseminated by the Bund through the medium of newspapers (see Paragraph XIII, supra), and through books, pamphlets and leaflets distributed by Bund members at headquarters, Bund camps and elsewhere.

XV.

The Bund conducted a school at which officers and selected members were given special training in public speaking and in the methods and means of disseminating the principles of National Socialism. Such speakers were thereafter sent to Bund meetings and other gatherings to expound and advocate the philosophy of German National Socialism.

XVI.

The Bund sponsored and arranged speaking tours for members of the Nazi Party sent to the United States to address Bund meetings and other gatherings on the philosophy of German National Socialism.

XVII.

The Bund conducted camps at which Nazi flags and paraphernalia were exhibited; Nazi literature and propaganda were displayed, distributed and sold; speakers expounded the theories of German National Socialism; and at which both adults and youths were taught the principles of Nazi-ism and exhorted to be loyal to and preserve in their minds and lives the theories and philosophy of Germany over and above the theories and philosophies of the United States.

XVIII.

The Bund sought to and did instill in its members an allegiance to Germany and to the Nazi Party, and its leaders through the exhibition and use of such Nazi paraphernalia as the swastika, through the singing of such Nazi songs as the "Horst Wessel", and through the display and repetition of such slogans as "Ein Volk" (one people—the German people), "Ein Reich" (one country—Germany), "Ein Fuehrer" (one leader—Adolph Hitler).

XIX.

Within the Bund there existed a uniformed group known as the "Ordnungs Dienst". The "Ordnungs Dienst" was patterned after the Nazi Storm Troopers of Germany. It was a militant body of selected Bund members trained in military techniques and designed to serve as a nucleus for a future and larger military organization if and when the aims of the Bund were accomplished in the United States. It was used by

the Bund to spread the philosophies of the Bund and of German National Socialism, and to distribute literature and propaganda of German origin and thought.

XX.

The Bund organized and conducted a Youth Group ("Jungenschaft") which was modeled upon the Hitler Youth in Germany. Members of the Youth Group were taught the precepts of the Nazi philosophy; they were instructed in the German language to the exclusion of English; they were taught to keep **Germany**, German leaders, and German ideas foremost in their minds and to be loyal to them; they were taught to be German rather than American.

XXI.

From and after 1935 there was a group within the Bund known as the "Prospective Citizens League". Membership in said league was made up of German nationals who had filed declarations of intention to become citizens of the United States, but whose citizenship had not been completed. This division of the Bund was created for the purposes of organizing and keeping German nationals within the Bund, in order to prevent assimilation of such German nationals in American life, and to foster in such German nationals an adherence to the Nazi cause and to German National Socialism as represented by the Bund in this country. Members of the Prospective Citizens League were, in fact, members of the Bund, engaged in all activities of the Bund, and enjoyed all the rights and privileges pertaining to membership in the Bund.

There was no distinction between a Bund "member" and a member of the Prospective Citizens League.

XXII.

There was within the Bund a group known as "Forderers" or "Sympathizers". That designation was devised to conceal the affiliations of certain persons within the Bund. "Forderers" or "Sympathizers" were, in fact, members of the Bund, engaged in all the activities of the Bund, and in Bund membership. There was no distinction between a "Forderer" or "Sympathizer" and a Bund "member".

XXIII.

Throughout the life of the Friends of the New Germany and the German-American Bund, these organizations maintained a thorough program for acquainting and indoctrinating its members with the National Socialism doctrines and objectives for which it stood. This took the form of the Bund newspaper to which members were urged to subscribe, Bund commands issued and read to the members, pamphlets and documents distributed among the members, speakers from Germany and others sent out by Bund headquarters, national and district conventions and regional meetings, celebration and observation of Hitler's birthday and other German holidays, instructions given by local leaders to the Bund membership, the order of procedure with the display of Nazi flags and banners, and the use of National Socialistic slogans.

The Bund's program and doctrines were irreconcilable with allegiance to the United States and with the principles of the United States Constitution. Persons acquainted with the Bund's program and doctrines and who continued to participate in the Bund were acting in a manner inconsistent with attachment to the principles of the United States Constitution and with loyalty to the United States.

Consequently, a strong presumption arises that the officers and members who were active participants in the Bund's program over a considerable period of time could not escape having knowledge of the Bund's National Socialistic program and its connection with and control by the Nazi Party and the German Government.

XXIV.

The aims and purposes of the Bund, as promulgated and carried out by the San Francisco, Oakland, and Concord units, were identical with the aims and purposes of the national organization. Among other things, these units endeavored to create sympathy amongst the people of German extraction for the New Germany and to counteract the Jewish boycott on German-made goods.

XXV.

Bund commands were received from national headquarters by these local units and read to the members. These commands instructed the units concerning the best manner by which the membership could be of

assistance to Germany, advised the units in all matters relative to National Socialism, and directed the units in the conduct of their affairs.

XXVI.

These local units of the Bund and of the Friends of the New Germany held membership meetings and social meetings. The membership meetings were for members only. Meetings of the units closed by singing the "Horst Wessel" song. The Nazi salute was the official salute of the units. Their official flag was the swastika. They also used the American flag. Contributions were solicited from the members for the "Fighting Fund" to defray legal expenses of Fritz Kuhn's trial in New York City. Members contributed to the German Winter Relief. Dues were paid and a part of same was sent to Bund headquarters in New York. Some members received both the 1937 and 1938 editions of the Bund Year Book. Members were urged to purchase and subscribe to the Bund newspaper, and many did so.

XXVII.

National Bund officials and prominent Nazis delivered speeches to the local units. Some of the speakers were Fritz Kuhn, Wilhelm Kunze and Herman Schwinn, West Coast Leader. These speeches concerned the New Germany, conditions therein, and the functions of the Bund in its relation to that country.

XXVIII.

Not only did these units at their membership meetings advocate the principles of National Socialism, but even at their social meetings they grasped the opportunity further to instruct their members along these lines. At these social evenings motion pictures depicted the progress of the New Germany under Hitler, and travelogues were shown. At such meetings propaganda literature, some of which was printed in Germany, was available for distribution and sale. Speeches by Hitler, Goebbels, and other prominent Nazi officials, as well as the Bund newspaper, were on sale.

XXIX.

The local units had a uniformed group, the Ordnungs Dienst, or the O.D. Their uniforms consisted of a cap, white shirt (at one time a gray shirt), black tie, Sam Browne belt, breeches, and a white and red arm band with the swastika insignia thereon. The O.D. acted as a color guard and displayed both the American flag and the Bund flag which bore the swastika emblem. The uniforms were similar to those worn by the Storm Troopers in Germany, and the purpose of the O.D. was principally to protect members from attack during meetings, to act as ushers, and to distribute German pamphlets and literature.

XXX.

The local units sent representatives to the various district and national Bund conventions. In Germany

the Bund in 1936 paraded in uniform through the streets of Berlin and to the Reich Chancellory. This group presented a "Golden Book" to Hitler, in which were inscribed the names of the individuals who contributed a sum of money which was also presented to Hitler at that time. Some members of the local units contributed to this fund.

XXXI.

In carrying out the activities hereinabove described, and seeking to accomplish their real aims and purposes, the local units of the Bund demonstrated themselves to be militant Nazi organizations, antagonistic to the democratic form of government and to the Constitution and laws of the United States, and that they were un-American and subversive.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court draws the following Conclusions of Law:

I.

In carrying out the activities hereinabove described, and in seeking to accomplish its real aims and purposes, the Bund demonstrated itself to be a German Militant "Fifth Column" organization in the United States, antagonistic to the democratic form of government and to the Constitution and laws of the United States un-American and subversive. One who believes in the National Socialist philosophy and form of government cannot at the same time be loyal to

the United States nor attached to the principles of the Constitution and laws of the United States.

II.

The principles of German National Socialism are opposed in all respects to the principles of democracy and to the Constitution and laws of the United States.

FINDINGS OF FACTS AS TO PAUL FIX

(Tr. p. 27)

I.

That the defendant Paul Fix at the time of filing of the complaint herein was a resident of the Town of Lafayette, County of Contra Costa, and within the jurisdiction of this Court.

II.

That the defendant was born in Haslach, Germany, on January 26, 1904; came to the United States in December, 1928; filed his Declaration of Intention to become a citizen of the United States on June 29, 1929; and thereafter filed his petition for citizenship in the Southern Division of the United States District Court for the Northern District of California on September 23, 1933. That thereafter he was examined, together with two witnesses to said petition, by the United States Naturalization Examiner in San Francisco, California, on said petition. Thereafter, by an order of said District Court, de-

defendant was admitted to become a citizen of the United States on January 6, 1936, at the conclusion of an open hearing in said Court on said petition, upon the favorable recommendation of the said United States Naturalization Examiner; that thereupon defendant took the oath of allegiance to the United States, and, by virtue of said order of said Court, Certificate of Naturalization No. 4047905 was issued to defendant, who now claims citizenship thereunder.

III.

That the defendant joined the German-American Bund late in the year 1938 or in the early part of 1939, paid dues for approximately three months, and subsequently received a membership card. Defendant never became an officer of the Bund, nor a member of the Ordnungs Dienst. Defendant remained a member of the Bund until about September, 1939.

IV.

From 1934 to 1937, defendant, while not a member during these years, did attend various meetings and gatherings of the Friends of the New Germany and the German-American Bund. In April 1937 defendant returned to Germany with his wife for approximately four months. From the latter part of 1937 until the latter part of 1939 he attended numerous affairs of the German-American Bund where he heard many lectures on the merits of National Socialism and at which meetings and gatherings the

German swastika flag was displayed, the Nazi salute with the outstretched right arm was given, and the "Horst Wessel" was sung; also during these years defendant read "Weckruf und Beobachter", the official newspaper of the German-American Bund, which was distributed, at meetings. In 1938 defendant attended the German-American Bund picnic at Dublin Canyon, upon the occasion of the burning of a large swastika upon the hillside.

In September 1939 defendant drove his car, at his own expense, to Los Angeles, California, and attended the Gautag West (Western District Convention), although not a delegate nor an officer of the Bund. Defendant took with him other Bund members, and in attendance at said convention was Gottfried Karl Hein, leader of the San Francisco and Oakland units. Upon this occasion a group telegram was sent by Bund members to senators and congressmen in Washington, urging that the United States remain neutral in the European conflict. Defendant subscribed to this telegram and received a reply directed to him at Bund headquarters, Los Angeles, California, from Senator Hiram W. Johnson.

V.

Defendant made the following statements to Witness McClure:

Shortly after Pearl Harbor was bombed by the Japs, defendant said it served this country right, and referred to the president and the cabinet as

war-mongers. Later, in connection with the purchase of war bonds, he said he did not want any, that he wanted other things more, that they would be no good after the war, and that Germany would win the war. He said the gold in Fort Knox would be melted into German marks. In referring to the salvage program of this Government, defendant said he would not give the S. B.'s anything. When told on one occasion that he would have to turn in any empty tube when he purchased a new tube of shaving cream, he said he would take the cream in a jar and would not give them a dam thing. Several times defendant referred to Jews as S. B.'s and bastards, and was heard to say that the United States should have the National Socialist form of government.

VI.

In January, 1943, in discussing with the California State Humane Officer an incident of the shooting of a dog allegedly shot by defendant, the defendant stated that Hitler would take over this country and would then take care of the State Humane Officer.

VII.

In April, 1940, defendant moved to a room at 101 Steiner Street in San Francisco, where he lived for approximately three months. On one occasion during this period of time, defendant was talking to his landlady and her daughter about Germany.

He said that all unions in this country should be broken like they were in Germany, that Hitler had seen to it that all unions were broken in Germany, that the Germans here were planning to take over America, that they were planning to rise when Hitler told them to, that they were all armed and prepared, and that they were also prepared to take over South America as well as North America. Defendant said there was a retired United States Army general by the name of Moseley whom the Nazis had picked as their leader in America, and defendant stated that all the Jews would have to go—that they would have to be wiped out. Defendant referred to the Jewish people in Germany as being wiped out, and said that President Roosevelt was a Jew.

VIII.

Also during the time defendant was living at 101 Steiner Street he received invitations through the mail to German-American Bund meetings, and he received copies of "Weekruf und Beobachter". He kept various German and other phonograph records in his room, at least one of which concluded with the words "Heil Hitler".

IX.

In 1941, after war was declared between the United States and Germany, defendant stated that if the president had kept his mouth shut the United States would not have been in the war.

X.

After defendant returned from his trip to Germany in 1937, he said Hitler was doing a fine job for the people there and that we may need a Hitler here to change our conditions. Defendant also stated that he did not want any Jewish salesmen calling on him at his place of business, which had been that of operating and conducting a bakery in various locations over a period of years.

XI.

Defendant made a small contribution of twenty-five cents for German winter relief when he was in Germany in 1937, and contributed one dollar to such here in San Francisco.

XII.

That the sworn oaths and statements of the defendant in his Petition for Naturalization and in his oath of allegiance at the date of naturalization, as set forth in the complaint, were then and there false, fraudulent, and illegal in that the defendant, at the time of taking said oaths, did not in fact absolutely and entirely renounce and abjure all allegiance and fidelity to Germany and the German Reich, but in fact intended to and did secretly reserve and retain allegiance and fidelity to Germany and the German Reich; nor did the defendant then and there intend to support and defend the Constitution and laws of the United States of America against all

enemies, foreign and domestic, but in fact the said defendant then and there secretly reserved his intention not to support and defend the Constitution and laws of the United States of America against Germany and the German Reich should they become enemies of the United States of America; nor did the defendant at the time of taking said oaths intend to bear true faith and allegiance to the United States of America, but in fact secretly reserved and retained his intention not to bear true faith and allegiance to the United States of America. That by taking said oaths falsely, with the secret mental reservations and intentions as aforesaid, the defendant deceived the United States, its officers and agents, and the said Naturalization Court at the date of admission to citizenship in order that said defendant might obtain the rights, privileges and protection of citizenship in the United States of America.

XIII.

That prior to, at the time of, and at all times subsequent to his naturalization, the defendant was acquainted with, sympathized, and agreed with the aims, purposes, and doctrines of the German-American Bund.

XIV.

That on the date of the defendant's petition for naturalization, at the time of his naturalization, and at all times subsequently, the defendant's allegiance has been to Germany rather than to the United

States, and his attachment has been to National Socialism rather than to the principles of the United States Constitution. His lack of allegiance to the United States and his lack of attachment to the principles of the Constitution have not changed or varied in the interval since his naturalization, and his attitude in these respects was the same when he was naturalized as in subsequent years up to the date of the trial.

XV.

The Findings of Fact with respect to the consolidated common issue hereinabove set forth are incorporated herein and made a part hereof by reference.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the Court concludes as matters of law:

I.

That this Court has jurisdiction to hear and determine the issues in this action.

II.

That the Certificate of Naturalization, granted as aforesaid, was illegally and fraudulently procured by the said defendant, and should be revoked, set aside and canceled.

III.

The Conclusions of Law with respect to the consolidated common issue hereinabove set forth are

incorporated herein and made a part hereof by reference.

(The preceding Findings of Fact and Conclusions of Law as to Paul Fix, Case No. 22577-G, are from Findings of Fact and Conclusions of Law, filed March 31, 1944, in Case No. 22411-G, United States of America v. Johannes Frederick Bechtel.)

(Endorsed): Filed March 31, 1944.

No. 12097

United States
Court of Appeals

for the Ninth Circuit

R. E. SHELDON, as Executive Director, Unemployment Compensation Commission of Alaska, ERNEST F. JESSEN, ANTHONY ZORICH and GEORGE VAARA as the Unemployment Compensation Commission of Alaska, UNITED SMELTING, REFINING AND MINING COMPANY, a corporation, ALASKA LAUNDRY, INC., a corporation, PACIFIC AMERICAN FISHERIES, INC., a corporation, HEALY RIVER COAL CORPORATION, a corporation, JUNEAU SPRUCE CORPORATION, a corporation, WESTERN FISHERIES COMPANY, a corporation, WELLS ALASKA MOTORS, a co-partnership, and JOE COBLE, doing business as The Pioneer Cab Company, and all others similarly situated,

Appellants,

vs.

FELTON H. GRIFFIN,

Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska,
Third Division

FILED
DEC 10 1948

No. 12097

United States
Court of Appeals
for the Ninth Circuit

R. E. SHELDON, as Executive Director, Unemployment Compensation Commission of Alaska, ERNEST F. JESSEN, ANTHONY ZORICH and GEORGE VAARA as the Unemployment Compensation Commission of Alaska, UNITED SMELTING, REFINING AND MINING COMPANY, a corporation, ALASKA LAUNDRY, INC., a corporation, PACIFIC AMERICAN FISHERIES, INC., a corporation, HEALY RIVER COAL CORPORATION, a corporation, JUNEAU SPRUCE CORPORATION, a corporation, WESTERN FISHERIES COMPANY, a corporation, WELLS ALASKA MOTORS, a co-partnership, and JOE COBLE, doing business as The Pioneer Cab Company, and all others similarly situated,

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Appeal from the District Court for the Territory of Alaska,
Third Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Plaintiff and Appellee. [1 *]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court for the Territory of Alaska,
Third Division

No. A-4597 Civil

FELTON H. GRIFFIN,

Plaintiff,

vs.

R. E. SHELTON as Executive Director, Unemployment Compensation Commission of Alaska:
ERNEST F. JESSEN, ANTHONY ZORICH,
and GEORGE VAARA, as the Unemployment
Compensation Commission of Alaska,
Defendants.

COMPLAINT

Comes now the plaintiff in the above-entitled action and complains and alleges as follows:

I.

That plaintiff is now and was at all times herein mentioned a resident citizen and taxpayer of the Territory of Alaska.

II.

That the defendant, R. E. Sheldon, is now, and at all times herein mentioned has been the Executive Director of the Unemployment Compensation Commission of Alaska and as such Executive Director is charged with the duties of administering the Alaska Unemployment Compensation Law as amended (Session Laws of Alaska, 1937, Chapter Four, as amended); that he is a citizen of the Territory of Alaska, residing at Juneau, Alaska.

III.

That defendants, Ernest F. Jessen, Anthony Zorich and George Vaara, are each resident citizen of the Territory of Alaska, and these three constitute, under due appointment and commission, the Unemployment Compensation Commission of Alaska.

IV.

That the Thirteenth Legislature for the Territory of Alaska in Extraordinary Session Assembled during the year 1937 passed an act entitled "An Act to provide for unemployment compensation; [2] to provide for the establishment of public employment offices; to provide funds therefor; to create a commission to administer the Act; and to define its duties; to provide for its appointment; to provide for cooperation with the United States of America, in the administration of the Act; to provide penalties for violation; to provide for an appropriation to carry the Act into effect; and to declare an emergency." Said act provided in Section 1 as follows: "This Act shall be known and may be cited as the Alaska Unemployment Compensation Law."

V.

That the Eighteenth Legislature for the Territory of Alaska in regular session assembled during the year 1947 purported to have passed an act amending the Alaska Unemployment Compensation Law; that the title of said purported amendment is as follows: "An Act to amend Chapter 4 of the Extraordinary Session Laws of Alaska, 1937, as amended by Chapter 1 and 51, Session Laws of

Alaska, 1939, as amended by Section 20, Chapter 40, Session Laws 1941, by amending Subsection 7 (c) providing for and establishing an Experience Rating for Territorial Employers under the Alaska Unemployment Compensation Law and amending Subsection 4(d) and to declare an effective date."

VI.

That the said purported amendment provided in Subsection 7(c)(2) et seq thereof for the establishment of a system of "credits" for so-called "qualified employers", which said "credits" under an involved and complicated mathematical formula set out in the said amendment, could result in a "surplus", so called, in favor of employers within so-called "credit classes", resulting in "credit notices" being given to employers qualifying under the said amendment, said "credit notices" to be applied to reduce future unemployment compensation payments made by the employers qualifying [3] thereunder.

VII.

That the effect of the said so-called "Experience Rating" Amendment to the Alaska Unemployment Compensation Act will be to reduce payments to the Alaska Unemployment Compensation Fund in the approximate amount of one-half million dollars for the fiscal year commencing on July 1, 1947, and in increasing amounts yearly thereafter and that the "class" of employers benefitting most by reason of enactment of said amendment will be non-resident, seasonal employers, engaged in the fish and mining industries and not accountable for, nor

concerned with, the economy of the Territory of Alaska.

VIII.

That the said reductions will seriously affect the economy of the Territory; that nowhere in the title of the said amendment is the true nature and effect of the said amendment expressed; that the said amendment is invalid by reason of the fact that it does not comply with Section 8 of the Organic Act wherein it is expressly provided, "That the enacting clause of all laws passed by the legislature shall be 'Be it enacted by the Legislature of the Territory of Alaska.' No Law shall embrace more than one subject, which shall be expressed in its title."

IX.

That the said Experience Rating Bill (Senate Bill Number 105), in Section 2 thereof, further purports to amend the Unemployment Compensation Act by changing Subsection 4(d) thereof to reduce the waiting period from two to one week before benefits under the act can be claimed by an unemployed person.

X.

That nowhere in the title of the said bill is there an indication of the true nature and effect of the said amendment to subsection 4(d); the only words in the said title concerning the said amendment being as follows, to-wit: "* * * and amending subsection 4(d) * * *" (of the Unemployment Compensation Law.) [4]

XI.

That the said amendment to Subsection 4(d) is invalid by reason of failure to comply with Section 8 of the Organic Act, as amended, wherein it is expressly provided as follows, to-wit:

“That the enacting clause of all laws passed by the legislature shall be ‘Be it enacted by the Legislature of the Territory of Alaska’. No law shall embrace more than one subject, which shall be expressed in its title.”

XII.

That the said Experience Rating Bill (Senate Bill Number 105), while pending in the House of Representatives of the Territorial Legislature, and before a final vote had been conducted on the said bill by the members of the said House of Representatives, the said bill was ordered sent to the Senate of the Territorial Legislature and that the members of the said House failed to vote upon the said bill in final passage, and to enter the same upon the House Journal.

XIII.

That the said bill is invalid by reason of failure of the said House of Representatives to comply with Section 13 of the Organic Act (as amended) wherein it is specifically provided as follows:

“That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by majority vote of all members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by

the house in which it originated or in which amendments thereto shall have originated, shall immediately be enrolled and certified by the presiding officer and the Clerk and sent to the other house for consideration."

XIV.

That the said Experience Rating Bill (Senate Bill Number 105), while before the House of Representatives of the Territorial Legislature, was not given three separate readings before the said [5] House and that the said bill is invalid by reason of the failure of the said House to comply with Section 13 of the Organic Act (as amended) which provides as follows:

"That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by majority vote of all members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or in which amendments thereto shall have originated, shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration."

XV.

That after the purported passage of the Experience Rating Bill (Senate Bill Number 105), the same was vetoed by the Governor of Alaska; that thereafter the members of the House and Senate of the Territorial Legislature failed to vote upon the passage of said bill, the Governor's veto notwithstanding.

XVI.

That the said bill is invalid by reason of the failure of the members of the Legislature to comply with Section 14 of the Organic Act (as amended) providing as follows:

“That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the Governor. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the Governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature. If the Governor does not approve such bill, he may return it, with his objections, to the Legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. That upon the receipt of a veto message from the Governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes, which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-third vote of all members to which each house is entitled, it shall thereby become a law. That if the Governor neither signs nor vetoes a bill within [6] three days (Sundays excepted) after it is delivered to him, it shall become a law without his signature, unless the legis-

lature adjourns sine die prior to the expiration of such three days. If any bill shall not be returned by the Governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in a like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law."

XVII.

That the Governor of Alaska refused to sign said Experience Rating Bill (Senate Bill Number 105), and has not signed the same.

XVIII.

That the Eighteenth Territorial Legislature for the Territory of Alaska adjourned sine die prior to the third day after receipt of the said Experience Rating Bill (Senate Bill Number 105) by the Governor of Alaska.

XIX.

That the said Experience Rating Bill (Senate Bill Number 105) is invalid by reason of the refusal of the Governor of Alaska to sign said bill as is required by Section 14 of the Organic Act (as amended) in order for said bill to become a law.

Wherefore, plaintiff prays judgment against defendants, and each of them, as follows:

That defendants and each of them be enjoined and restrained from issuing credit notices or otherwise establishing credits for employers against sums due and owing or to become due and owing

under the Alaska Unemployment Compensation Law;

That the Court find and declare Chapter 74 of the Session Laws of Alaska for 1947 entitled, "An act to amend Chapter 4 of the Extraordinary Session Laws of Alaska, 1937, as amended by Chapter 1 and 51, Session Laws of Alaska, 1939, as amended by Section 20, Chapter 40, Session Laws, 1941, by amending Subsection 7(c) [7] providing for and establishing an Experience Rating for Territorial Employers under the Alaska Unemployment Compensation Law and amending Subsection 4(d) and to declare an effective date," null and void and of no force and effect.

McCUTCHEON & NESBETT,
Attorneys for Plaintiff.

By /s/ S. McCUTCHEON.

United States of America,
Territory of Alaska—ss.

Felton H. Griffin, being first duly sworn, on oath, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing Complaint, knows the contents thereof, and the same is true as he verily believes.

/s/ FELTON H. GRIFFIN.

Subscribed and Sworn to before me this 11th day of July, 1947.

(Seal) /s/ S. McCUTCHEON,

Notary Public in and for Alaska.

My commission expires 12/29/47.

[Endorsed]: Filed July 11, 1947.

[8]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff in the above-entitled action and complains and alleges as follows:

I.

That plaintiff is now and was at all times herein mentioned a resident citizen and taxpayer of the Territory of Alaska.

II.

That the defendant, R. E. Sheldon, is now, and at all times herein mentioned has been the Executive Director of the Unemployment Compensation Commission of Alaska and as such Executive Director is charged with the duties of administering the Alaska Unemployment Compensation Law as amended (Session Laws of Alaska, 1937, Chapter Four, as amended); that he is a citizen of the Territory of Alaska, residing at Juneau, Alaska.

III.

That defendants, Ernest F. Jessen, Anthony Zorich and George Vaara, are each resident citizens of the Territory of Alaska, and these three constitute, under due appointment and commission, the Unemployment Compensation Commission of Alaska. [9]

IV.

That the Thirteenth Legislature for the Territory of Alaska in Extraordinary Session Assembled during the year 1937 passed an act entitled "An Act to provide for unemployment compensation; to provide for the establishment of public employ-

ment offices; to provide funds therefor; to create a commission to administer the Act; and to define its duties; to provide for its appointment; to provide for cooperation with the United States of America in the administration of the Act; to provide penalties for violation; to provide for an appropriation to carry the Act into effect; and to declare an emergency." Said act provided in Section 1 as follows: "This Act shall be known and may be cited as the Alaska Unemployment Compensation Law."

V.

That the Eighteenth Legislature for the Territory of Alaska in regular session assembled during the year 1947 purported to have passed an act amending the Alaska Unemployment Compensation Law; that the title of said purported amendment is as follows: "An Act to amend Chapter 4 of the Extraordinary Session Laws of Alaska, 1937, as amended by Chapter 1 and 51, Session Laws of Alaska, 1939, as amended by Section 20, Chapter 40, Session Laws, 1941, by amending Subsection 7 (c) providing for and establishing an Experience Rating for Territorial Employers under the Alaska Unemployment Compensation Law and amending Subsection 4(d) and to declare an effective date."

VI.

That the said purported amendment provided in Subsection 7(c)(2) et seq thereof for the establishment of a system of "credits" for so-called "qualified employers", which said "credits" under an involved and complicated mathematical formula

set out in the said amendment, could result in a "surplus", so called, in favor of employers within so-called "credit classes", resulting in "credit notices" being given to [10] employers qualifying under the said amendment, said "credit notices" to be applied to reduce future unemployment compensation payments made by the employers qualifying thereunder.

VII.

That the effect of the said so-called "Experience Rating" Amendment to the Alaska Unemployment Compensation Act will be to reduce payments to the Alaska Unemployment Compensation Fund in the approximate amount of one-half million dollars for the fiscal year commencing on July 1, 1947, and in increasing amounts yearly thereafter and that the "class" of employers benefiting most by reason of enactment of said amendment will be non-resident, seasonal employers, engaged in the fish and mining industries and not accountable for, nor concerned with, the economy of the Territory of Alaska.

VIII.

That the said reductions will seriously affect the economy of the Territory; that nowhere in the title of the said amendment is the true nature and effect of the said amendment expressed; that the said amendment is invalid by reason of the fact that it does not comply with Section 8 of the Organic Act wherein it is expressly provided, "That the enacting clause of all laws passed by the legislature shall be 'Be it enacted by the Legislature

of the 'Territory of Alaska.' No law shall embrace more than one subject, which shall be expressed in its title."

IX.

That the said Experience Rating Bill (Senate Bill Number 105), in Section 2 thereof, further purports to amend the Unemployment Compensation Act by changing Subsection 4(d) thereof to reduce the waiting period from two to one week before benefits under the act can be claimed by an unemployed person. [11]

X.

That nowhere in the title of the said bill is there an indication of the true nature and effect of the said amendment to Subsection 4(d); the only words in the said title concerning the said amendment being as follows, to-wit: "'* * * and amending Subsection 4(d) * * *'" (of the Unemployment Compensation Law).

XI.

That the said amendment to Subsection 4(d) is invalid by reason of failure to comply with Section 8 of the Organic Act, as amended, wherein it is expressly provided as follows, to-wit:

"That the enacting clause of all laws passed by the legislature shall be 'Be it enacted by the Legislature of the Territory of Alaska'. No law shall embrace more than one subject, which shall be expressed in its title."

XII.

That the said Experience Rating Bill (Senate Bill Number 105), while pending in the House of

Representatives of the Territorial Legislature, and before a final vote had been conducted on the said bill by the members of the said House of Representatives, the said bill was ordered sent to the Senate of the Territorial Legislature and that the members of the said House failed to vote upon the said bill in final passage, and to enter the same upon the House Journal.

XIII.

That the said bill is invalid by reason of failure of the said House of Representatives to comply with Section 13 of the Organic Act (as amended) wherein it is specifically provided as follows:

“That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by majority vote of all members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or in which amendments thereto shall have originated, shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration.” [12]

XIV.

That the said Experience Rating Bill (Senate Bill Number 105), while before the House of Representatives of the Territorial Legislature, was not given three separate readings before the said House and that the said bill is invalid by reason of the failure of the said House to comply with Section 13 of the Organic Act (as amended) which provides as follows:

“That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by majority vote of all members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or in which amendments thereto shall have originated, shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration.”

XV.

That after the purported passage of the Experience Rating Bill (Senate Bill Number 105), the same was vetoed by the Governor of Alaska; that thereafter the members of the House and Senate of the Territorial Legislature failed to vote upon the passage of said bill, the Governor's veto notwithstanding.

XVI.

That the said bill is invalid by reason of the failure of the members of the Legislature to comply with Section 14 of the Organic Act (as amended) providing as follows:

“That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the Governor. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the Governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter,

unless sooner given effect by a two-thirds vote of said legislature. If the Governor does not approve such bill, he may return it, with his objections, to the Legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. That upon the receipt of a veto message from the Governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes, [13] which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-third vote of all the members to which each house is entitled, it shall thereby become a law. That if the Governor neither signs nor vetoes a bill within three days (Sundays excepted) after it is delivered to him, it shall become a law without his signature, unless the legislature adjourns sine die prior to the expiration of such three days. If any bill shall not be returned by the Governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in a like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law."

XVII.

That the Governor of Alaska refused to sign said Experience Rating Bill (Senate Bill Number 105), and has not signed the same.

XVIII.

That the Eighteenth Territorial Legislature for the Territory of Alaska adjourned sine die prior to the third day after receipt of the said Experience Rating Bill (Senate Bill Number 105) by the Governor of Alaska.

XIX.

That the said Experience Rating Bill (Senate Bill Number 105) is invalid by reason of the refusal of the Governor of Alaska to sign said bill as is required by Section 14 of the Organic Act (as amended) in order for said bill to become a law.

XX.

That plaintiff is informed and believes, and therefore alleges on such information and belief that the defendants herein, their servants, agents or employees, are about to issue experience rating credits to various employers pursuant to the said Experience Rating Bill (Senate Bill Number 105).

XXI.

That if the said experience rating credits are issued it will result in a wrongful, illegal and unlawful loss of funds of the Territory of Alaska, and without any authority of the Law, [14] or right, and will be wholly lost to the taxpayers of the Territory of Alaska, and that plaintiff and all other taxpayers of the Territory of Alaska will be irreparably damaged and injured thereby, and all without any possible redress or any plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays judgment against defendants, and each of them, as follows:

That defendants and each of them be enjoined and restrained from issuing credit notices or otherwise establishing credits for employers against sums due and owing or to become due and owing under the Alaska Unemployment Compensation Law;

That the Court find and declare Chapter 74 of the Session Laws of Alaska for 1947 entitled, "An Act to amend Chapter 4 of the Extraordinary Session Laws of Alaska, 1937, as amended by Chapter 1 and 51, Session Laws of Alaska, 1939, as amended by Section 20, Chapter 40, Session Laws, 1941, by amending Subsection 7(c) providing for and establishing an Experience Rating for Territorial Employers under the Alaska Unemployment Compensation Law and amending Subsection 4(d) and to declare an effective date", null and void and of no force and effect.

That plaintiff be allowed a temporary restraining order, enjoining and restraining defendants, and each of them, from issuing credit notices or otherwise establishing credits for employers against sums due and owing or to become due and owing under the Alaska Unemployment Compensation Law.

McCUTCHEON & NESBETT,
Attorneys for Plaintiff.

By /s/ STANLEY McCUTCHEON.

United States of America,
Territory of Alaska—ss.

Felton H. Griffin, being first duly sworn, on oath deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing Amended Complaint, knows the contents thereof, and the same are true as he verily believes.

/s/ FELTON H. GRIFFIN,

Subscribed and Sworn to before me this 2nd day of August, 1947.

/s/ S. McCUTCHEON,

Notary Public in and for Alaska.

My commission expires 12/29/47.

[Endorsed]: Filed Aug. 6, 1947.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO INTERVENE

Come now the United States Smelting, Refining & Mining Company, a corporation, Alaska Laundry, Inc., a corporation, Pacific American Fisheries, Inc., a corporation, Healy River Coal Corporation, a corporation, Juneau Spruce Corporation, a corporation, Ketchikan Spruce Mills, a corporation, Western Fisheries Company, a corporation, Wells Alaska Motors, a co-partnership, and Joe Coble, doing business as The Pioneer Cab Company, and move the Court for Leave to Intervene in the above

entitled cause under the provisions of Section 3394 Compiled Laws of Alaska, 1933, and for leave to file the hereto attached Complaint in Intervention, and for leave to file an Answer to Plaintiff's Amended Complaint and to otherwise move against the Amended Complaint upon the ground that each of the proposed intervenors has an interest in the subject matter in litigation and in the allegations of the Amended Complaint and they will be affected by the outcome of this cause for the reasons set forth in the proposed complaint in intervention attached hereto.

/s/ FAULKNER & BANFIELD,

/s/ J. GERALD WILLIAMS,

Attorneys for Intervenors.

(Service of Copy Acknowledged August 29, 1947.
Frank L. Oliver, of Counsel for Defendants.)

[Endorsed]: Filed Sept. 8, 1947.

[17]

In the District Court for the Territory of Alaska,
Division Number Three

No. A-4597 Civil

FELTON H. GRIFFIN,

Plaintiff,

vs.

R. E. SHELDON as Executive Director, Unemployment Compensation Commission of Alaska: ERNEST F. JESSEN, ANTHONY ZORICH, and GEORGE VAARA as the Unemployment Compensation Commission of Alaska,
Defendants,

UNITED STATES SMELTING, REFINING & MINING COMPANY, a corporation; ALASKA LAUNDRY, INC., a corporation; PACIFIC AMERICAN FISHERIES, INC., a corporation; HEALY RIVER COAL CORPORATION, a corporation; JUNEAU SPRUCE CORPORATION, a corporation; KETCHIKAN SPRUCE MILLS, a corporation; WESTERN FISHERIES COMPANY, a corporation; WELLS ALASKA MOTORS, a copartnership; and JOE COBLE, d/b/a THE PIONEER CAB COMPANY, and all others similarly situated,

Intervenors.

COMPLAINT IN INTERVENTION

Come now the above named intervenors and petitioners, by leave of court, and represent, complain and allege as follows:

I.

That the above entitled cause is pending in the District Court for the Territory of Alaska, Third Judicial Division at Anchorage, Alaska, and it is brought for the purpose of testing the validity of Chapter 74 of the Session Laws of Alaska, 1947, entitled:

“An Act to amend Chapter 4 of the Extraordinary Session Laws of Alaska, 1937, as amended by Chapters 1 and 51 Session Laws of Alaska, 1939, as amended by Section 20, Chapter 40, Session Laws, 1941, by amending Subsection 7(c) providing for and establishing an Experience Rating for Territorial Employers under the Alaska Unemployment Compensation Law and amending Subsection 4(d) and to declare an effective date.” [18]

and Plaintiff in his complaint alleges that the Act is unconstitutional and void.

II.

That the above named intervenors and others are all doing business in the Territory of Alaska and authorized to do business therein and the intervening corporations have all complied with the laws of the Territory relating to corporations doing business in Alaska and they have all paid their corporation license taxes due the Territory and complied with all the laws of the Territory with reference to corporations; and that the United States Smelting, Refining and Mining Company is a corporation organized under the laws of the State of Maine; The Alaska Laundry, Inc. is a corpora-

tion organized under the laws of Alaska; the Pacific American Fisheries, Inc. is a corporation organized under the laws of Delaware; the Healy River Coal Corporation is a corporation organized under the laws of Alaska; the Juneau Spruce Corporation is a corporation organized under the laws of Alaska; the Ketchikan Spruce Mills is a corporation organized under the laws of Alaska; the Western Fisheries Company is a corporation organized under the laws of Washington; Wells Alaska Motors is a co-partnership doing business at Fairbanks, Alaska; and Joe Coble is a resident of Fairbanks, Alaska doing business as The Pioneer Cab Company.

III.

That each of the intervenors is interested in the above entitled cause and has an interest in the matter in litigation, and each and every employer of labor in the Territory has a similar interest.

IV.

That each of the intervenors pays a substantial sum into the unemployment compensation fund of the Territory of Alaska every quarter of each year and most of them have been so doing [19] since the date of the enactment of Chapter 4 Extraordinary Session Laws of Alaska 1937, hereinafter referred to.

V.

That the Juneau Spruce Corporation, a corporation organized under the laws of Alaska is engaged in lumbering and logging and in the operation of a saw mill at Juneau and it is successor of the

Juneau Lumber Mills, Inc., a corporation which carried on the same business until May 1, 1947 when its business and operations were taken over by the Juneau Spruce Corporation. That the Juneau Lumber Mills, predecessor in interest to the Juneau Spruce Corporation since the date of the enactment of the unemployment compensation law paid large sums into the unemployment compensation fund of the Territory each quarter and for the months of May and June, 1947 the Juneau Spruce Corporation had a payroll of \$129,315.07 and for those two months it paid into the unemployment compensation fund of the Territory the sum of \$3,490.52. That it now employs 257 men and its monthly current payroll is approximately \$126,800 which will require payments into the unemployment compensation fund of Alaska of more than \$41,000 annually.

VI.

That the Ketchikan Spruce Mills for the year ending January 31, 1946 had a total payroll of \$387,847.06 with an average number of employees of 119 and during that period it paid into the unemployment compensation fund of Alaska the sum of \$10,471.87.

VII.

That the Pacific American Fisheries, Inc. has paid large sums into the unemployment compensation fund since the date of the passage of the Act aforesaid and its payments average between \$40,000 and \$50,000 per annum and for the year beginning July 1, 1946 and ending June 30, 1947 it

paid into the unemployment compensation fund \$42,047.10. [20]

VIII.

That the Western Fisheries Company, a corporation, has paid large sums of money into the unemployment compensation fund since the date of the passage of the Act aforesaid and for the year beginning April 1, 1946 and ending March 31, 1947 it paid an unemployment compensation tax of \$6,190.59.

IX.

That the United States Smelting, Refining and Mining Company has a payroll from a minimum of 218 to a maximum of 642 employees annually. That its payroll to employees for the period from July 1, 1946 to June 30, 1947 was \$880,026.67 and it paid into the unemployment compensation fund of Alaska during that period \$23,760.72.

X.

That the Healy River Coal Corporation has an average number of employees in Alaska of 101 and during the period of July 1, 1946 to June 30, 1947 it paid into the unemployment compensation fund the sum of \$11,361.47.

XI.

That the Alaska Laundry, Inc. owns and operates a laundry at Juneau, Alaska, employing an average of 25 employees and that during the period from July 1, 1946 to June 30, 1947 it paid into the unemployment compensation fund of Alaska the sum of \$1,089.92 in contributions.

XII.

That the Wells Alaska Motors and Joe Coble are employers of labor in Alaska and they pay annually into the unemployment compensation fund substantial contributions.

XIII.

That on April 2, 1937, the Legislature of the Territory of Alaska assembled in Extraordinary Session passed an Act entitled [21]

“An Act to provide for unemployment compensation; to provide for the establishment of public employment offices; to provide funds therefor; to create a commission to administer the act; and to define its duties; to provide for its appointment; to provide for cooperation with the United States of America in the administration of the Act; to provide penalties for violation; to provide for an appropriation to carry the Act into effect; and to declare an emergency.”

And this Act was approved on April 2, 1937 and became effective immediately and it has been amended from time to time in minor details.

XIV.

That Chapter 4 of the Session Laws of Alaska 1937 and the amendments thereto provide for levying an unemployment compensation tax on certain employers of labor in the Territory including the intervenors of 2.7% of their entire pay roll which amounts are collected for the purpose of furnishing benefits to workers employed in the Territory and contributions and payments have been made from time to time and from year to year by employers in the Territory including the intervenors so that

when the Legislature convened in Juneau in January of 1947 there was approximately \$9,300,000 in the unemployment compensation fund.

XV.

That Chapter 4 of the Extraordinary Session Laws of Alaska 1937 was amended by Chapter 40 of the Session Laws of 1941, approved March 26, 1941 and among the amendments there is an amendment to Section 7(c) of Chapter 4 of the Laws of 1937 which is contained in Section 20 of Chapter 40 of the laws of 1941 and this amendment reads as follows:

Section 20 of Chapter 40 of the Laws of 1941—

“That Chapter 4, Section 7(c), 7(c)(1), 7(c)(2), Extraordinary Session Laws of Alaska, 1947, as amended by Chapters 1 and 51, Session Laws of Alaska, 1939, be amended by striking out the present sections and inserting in lieu thereof the following: [22]

“Section 7(c). ‘Study of Experience Rating.’ The Commission shall investigate and study the operation of this Act and the actual experience hereunder in the light of pertinent economic factors with a view to determining the advisability of establishing a rating system which would equitably rate the unemployment risk and fix the contribution to the fund of each employer and would encourage stabilization of employment.”

XVI.

That pursuant to the provisions of Section 20, Chapter 40 of the Session Laws of 1941, the Legislature in 1947 passed Chapter 74 of the Session Laws of 1947 hereinabove mentioned.

XVII.

That Chapter 74 of the Session Laws of Alaska 1947 was in the judgment of the intervenors duly, regularly and lawfully passed by the Legislature of the Territory of Alaska in its Eighteenth Session, and each of these intervenors is entitled to all the benefits to be received by the application thereof as they are still employers of labor in the Territory of Alaska and will continue to be from year to year.

XVIII.

That those intervenors have no plain, speedy or adequate remedy at law and are entitled to interpose such defense to plaintiff's complaint as may be lawfully interposed under the laws of Alaska.

Wherefore these intervenors pray that they may be permitted to defend the action above mentioned No. A-4597 Civil, pending in the above entitled court and file an answer to plaintiff's complaint and introduce such evidence and file such briefs and make such arguments as are proper in the defense of the validity of the law in question and proceed as though they had been made defendants in the above entitled cause; and that plaintiff take nothing by his complaint, but that it be dismissed and that these intervenors have such other and further relief as is meet in the premises. [23]

/s/ FAULKNER & BANFIELD,

/s/ J. GERALD WILLIAMS,

Attorneys for Intervenors.

United States of America,
Territory of Alaska—ss.

I, the undersigned, J. S. MacKinnon, being first duly sworn depose and say:

That I am President of the Alaska Laundry, Inc., a corporation, one of the Intervenor hereinabove named and am authorized to make this verification on its behalf; that I have read the foregoing "Complaint in Intervention" and know its contents and that the facts stated therein are true and correct as I verily believe.

/s/ J. S. MacKINNON.

Subscribed and sworn to before me this 29th day of August, 1947.

(Seal) /s/ M. J. LYMAN,
Notary Public for Alaska.

My Commission expires Aug. 21, 1950.

United States of America,
Territory of Alaska—ss.

I, H. L. Faulkner, being first duly sworn depose and say:

That I am one of the attorneys for the intervenors hereinabove named and make this verification on behalf of all of them; that I have read the foregoing "Complaint in Intervention" and know its contents and I am familiar with the facts therein alleged and that the facts alleged and the statements made are true and correct as I verily believe; and that I make this verification for and on

behalf of all the intervenors except the Alaska Laundry, Inc., for the reason that none of the intervenors is at the place where the verification is required to be made and I have been authorized to make the verification for and on behalf of the intervenors.

/s/ H. L. FAULKNER.

Subscribed and sworn to before me this 29th day of August, 1947.

(Seal) /s/ M. J. LYMAN.

Notary Public for Alaska.

Service of copy acknowledged August 29, 1947.
Signed Frank L. Oliver, of Counsel for Defendants.

[Endersd]: Filed Sept. 8, 1947. [24]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT IN
INTERVENTION

Comes now the above named plaintiff, and in answer to Intervenor's Complaint in Intervention, alleges as follows:

I.

Denies each and every allegation contained in Intervenor's Complaint.

Wherefore, plaintiff, having fully answered Intervenor's Complaint, prays judgment against the defendant as asked in plaintiff's Complaint.

McCUTCHEON & NESBETT,
Attorneys of Plaintiff,

By /s/ S. McCUTCHEON. [25]

United States of America,
Territory of Alaska,
Third Judicial Division—ss.

Felton H. Griffin, being first duly sworn upon his oath, deposes and says:

That he is the plaintiff in the above entitled action; that he has read the foregoing Answer, knows the contents thereof, and that the matters and things contained therein are true as he verily believes.

/s/ FELTON H. GRIFFIN.

Subscribed and sworn to before me this 13th day of March, 1948.

/s/ S. McCUTCHEON,
Notary Public in and for the Territory of Alaska.

(Service of Copy Acknowledged April 15, 1948. J. Gerald Williams, Attorney for Defendants.)

[Endorsed]: Filed April 15, 1948. [26]

[Title of District Court and Cause.]

ORDER PERMITTING INTERVENTION

Upon reading and filing the motion of the above named Intervenor and also upon inspection of the "Complaint in Intervention",

It is hereby ordered that the above named corporations and persons who are named as Intervenor be and they are hereby permitted to intervene in the above entitled cause and to file herein their Complaint in Intervention and such motions as they deem necessary and advisable and to answer

the amended complaint of plaintiff and to proceed in this cause as intervenors pursuant to law.

Done in open court this 12th day of September, 1947.

/s/ ANTHONY J. DIMOND,
Judge.

/s/ FRANK L. OLIVER,
of Counsel for Defendants.

Entered Court Journal No. G 15 Page 107, Sept. 12, 1947.

Service of copy acknowledged Aug. 29, 1947.

[Endorsed]: Filed Sept. 12, 1947. [27]

[Title of District Court and Cause.]

ANSWER

Come now the above named defendants, and in answer to the Amended Complaint on file herein, admit, deny and allege as follows:

1.

Admit the allegations contained in Paragraphs numbered I, II, III and IV of said Amended Complaint.

2.

Admit that the Eighteenth Legislature passed the Act referred to in Paragraph numbered V, but deny the implication of invalidity.

3.

Deny the allegations contained in Paragraph numbered VI save and except admit that the amend-

ment contained in subsection 7(c)(2) et seq. provides for the establishment of a system of credits for qualified employers under a formula [28] set out in the amendment, which credits may be applied to reduce future unemployment compensation payments made by qualified employers.

4.

Deny the allegation contained in Paragraphs numbered VII and VIII.

5.

Referring to the allegations contained in Paragraph numbered IX, admit that said Act changes subsection 4(d) thereof as stated, but deny the implication of invalidity.

6.

Deny the allegations contained in Paragraphs numbered X to XVI, inclusive.

7.

Referring to the allegations contained in Paragraph numbered XVII, admit that the Governor of Alaska did not sign the Act referred to, but allege that he expressly permitted it to become law without his signature, in the manner provided by the Organic Act.

8.

Deny the allegations contained in Paragraphs numbered XVIII and XIX.

9.

Admit the allegations contained in Paragraph numbered XX.

10.

Deny the allegations contained in Paragraph numbered XXI.

Wherefore, the defendants pray that the Amended Complaint be dismissed and that plaintiff take nothing thereby, [29] and defendants be allowed costs herein.

/s/ RALPH J. RIVERS,
Attorney General for Alaska.

/s/ FRANK L. OLIVER,
Assistant Attorney General,
Attorneys for Defendants.

(Duly Verified.)

[Endorsed]: Filed Sept. 9, 1947. [30]

[Title of District Court and Cause.]

ANSWER OF INTERVENORS TO PLAINTIFF'S AMENDED COMPLAINT

Come now the above named Intervenor for themselves and all other employers in Alaska similarly situated and in answer to plaintiff's Amended Complaint, admit, deny and allege as follows:

I.

Referring to the allegations contained in paragraph I of the Amended Complaint, the Intervenor has no knowledge upon which to base a belief as to the truth thereof, and therefore on information and belief deny the allegations contained in paragraph I.

II.

The Intervenor's admit the allegations contained in paragraph II.

III.

The Intervenor's admit the allegations contained in paragraph III. [31]

IV.

The Intervenor's admit the allegations contained in paragraph IV.

V.

The Intervenor's admit that the Eighteenth Legislature for the Territory of Alaska in regular session assembled during the year 1947 regularly passed the Act referred to in Paragraph V of the Amended Complaint.

VI.

Referring to the allegations contained in paragraph VI, the Intervenor's admit that the amendment contained in subsection 7(c)(2) et seq. provides for the establishment of a system of credits for qualified employers under a formula set out in the amendment, which credits may be applied to reduce future unemployment compensation payments made by qualified employers and the Intervenor's deny each and every other allegation contained in paragraph VI of the Amended Complaint.

VII.

Referring to the allegations contained in paragraph VII the Intervenor's admit that the effect of the "Experience Rating" amendment will be to reduce payments to the Alaska Unemployment Compensation Fund; deny that it will reduce the

payments one-half million dollars for the fiscal year commencing July 1, 1947, and in an increasing amount yearly thereafter; deny that the class of employers benefiting most by reason of the enactment of the amendment will be non-resident seasonal employers engaged in fish and mining industries; deny that those employers engaged in fish and mining industries are not concerned with the economy of the Territory and the Intervenor's allege that the Act in question provides for automatic adjustments of the amount of credits so as not to impair the unemployment compensation fund. [32]

VIII.

The Intervenor's deny that the reduction in contributions provided by the Act in question will have any effect upon the economy of the Territory; deny that the nature and effect of the amendment is not expressed in the title; deny that the amendment is invalid; deny that it is in conflict with Section 8 of the Organic Act or with any other provision of the Organic Act.

IX.

Intervenor's admit the allegations contained in paragraph IX of the Amended Complaint.

X.

Intervenor's deny the allegations contained in paragraph X of the Amended Complaint.

XI.

Intervenor's deny the allegations contained in paragraph XI of the Amended Complaint.

XII.

Intervenors deny the allegations contained in paragraph XII of the Amended Complaint.

XIII.

Intervenors deny the allegations contained in paragraph XIII of the Amended Complaint.

XIV.

Intervenors deny the allegations contained in paragraph XIV of the Amended Complaint.

XV.

Intervenors deny the allegations contained in paragraph XV of the Amended Complaint.

XVI.

Referring to the allegations contained in paragraph XVI, the Intervenors deny that the law is invalid by reason of the failure of the Legislature to comply with Section 14 of the Organic Act [33] of Alaska as amended, and in this connection they allege that while the Governor of Alaska did not approve the Act in question he expressly allowed it to become law without his signature as provided by the Organic Act of Alaska.

XVII.

The Intervenors admit the Governor of Alaska did not sign the "Experience Rating" Bill but alleges that he expressly permitted it to become a law in the manner provided in the Organic Act without his signature.

XVIII.

Intervenors deny the allegations contained in paragraph XVIII of the Amended Complaint.

XIX.

Intervenors deny the allegations contained in paragraph XIX of the Amended Complaint.

XX.

Referring to the allegations contained in paragraph XX the Intervenors admit that the defendants, pursuant to the provisions of the Act of the Legislature aforesaid, should issue experience rating credits to various employers pursuant to the provisions of the Experience Rating Bill.

XXI.

Intervenors deny the allegations contained in paragraph XXI.

Wherefore these Intervenors pray that Plaintiff's Amended Complaint herein be dismissed, and that he take nothing thereby, and that the Intervenors have such other and further relief as is meet in the premises.

FAULKNER AND BANFIELD,,
J. GERALD WILLIAMS,
Attorneys for Intervenors. [34]

United States of America,
Territory of Alaska—ss.

I, the undersigned, J. S. MacKinnon, being first duly sworn depose and say: That I am the President of the Alaska Laundry, Inc., a corporation, one of the Intervenors hereinabove named and am authorized to make this verification on its behalf; that I have read the foregoing Answer and know its contents and that the facts stated therein are

true and correct as I verily believe and I make this verification for all of the Intervenor.

/s/ J. S. MacKINNON.

Subscribed and sworn to before me this 29th day of August, 1947.

(Seal) /s/ H. L. FAULKNER,

Notary Public for Alaska.

United States of America,
Territory of Alaska—ss.

I, H. L. Faulkner being first duly sworn, depose any say: That I am one of the attorneys for the Intervenor hereinabove named and make this verification on behalf of all of them; that I have read the foregoing Answer and know its contents and I am familiar with the facts therein alleged and that the facts alleged and the statements made are true and correct as I verily believe and that I make this verification for and on behalf of all the intervenors except the Alaska Laundry, Inc., a corporation, for the reason that none of the Intervenor is at the place where the verification is required to be made. That I am authorized to make this verification on behalf of all the Intervenor and as agent of each.

/s/ H. L. FAULKNER.

Subscribed and sworn to before me this 29th day of August, 1947.

(Seal) /s/ MARY JANE LYMAN,

Notary Public for Alaska.

Service of Copy Acknowledged August 29, 1947.
Frank L. Oliver of Counsel for Defendants.

[Endorsed): Filed Sept. 13, 1947. [35]

[Title of District Court and Cause.]

REPLY TO INTERVENORS' ANSWER

Comes now the plaintiff in the above entitled action, and replies to the Intervenor's Answer on file herein as follows:

I.

The plaintiff denies each and every allegation contained in Intervenor's Answer.

Wherefore, plaintiff prays judgment against the defendant as asked in his Complaint.

McCUTCHEON & NESBETT,
Attorneys for the Plaintiff,

By /s/ S. McCUTCHEON. [36]

(Duly Verified.)

[Endorsed]: Filed April 15, 1948. [37]

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff in the above entitled action, and replies to the Answer on file herein as follows:

I.

The plaintiff denies each and every allegation contained in defendant's Answer.

Wherefore, plaintiff prays judgment against the defendant as asked in his Complaint.

McCUTCHEON & NESBETT,
Attorneys for the Plaintiff,

By /s/ STANLEY McCUTCHEON.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed April 15, 1948. [38]

[Title of District Court and Cause.]

STIPULATION FOR INTRODUCTION
OF EVIDENCE

It is hereby stipulated and agreed by and between Plaintiff, Defendants and Intervenor through their respective counsel that upon the trial of the above entitled cause there may be introduced in evidence by either the Plaintiff, the Defendants or the Intervenor, the bound printed volumes of the House and Senate Journals of the Alaska Legislature for the year 1947, Eighteenth Session, for the convenience of the Court in referring to the pertinent parts of the Journals involved in the above entitled cause, and that these printed copies of the Journals may be received as authentic and true copies of the proceedings in the Eighteenth Session.

It is further stipulated that United States Smelting, Refining and Mining Company, Pacific American Fisheries, Inc., Alaska Laundry, Inc., Healy River Coal Corporation, Juneau Spruce Corporation, Ketchikan Spruce Mills, Western Fisheries Company are all corporations authorized to do business and doing business in Alaska as alleged in the complaint in intervention and that Wells Alaska Motors is and was at all times alleged a co-partnership doing business in Alaska and that Joe Coble is and was at all times an individual doing business at Fairbanks, Alaska, under the name of Pioneer Cab Company.

Dated this 22nd day of March, 1948, at Juneau,

Alaska, by attorneys for defendants and intervenors, and at Anchorage, Alaska, by the attorneys for plaintiff the 1st day of April, 1948.

/s/ S. W. McCUTCHEON,
Attorney for Plaintiff.

/s/ RALPH J. RIVERS,
Attorney for Defendant.

/s/ FAULKNER & BANFIELD,

/s/ MEDLEY AND HAUGLAND,

/s/ J. GERALD WILLIAMS,

/s/ W. C. ARNOLD,

[Endorsed]: Filed Apr. 5, 1948. [41]

MINUTES OF PROCEEDINGS

April 20, 1948

Now at this time cause No. A-4597, entitled Felton H. Griffin, plaintiff, versus R. E. Sheldon as Executive Director, Unemployment Compensation Commission of Alaska; Ernest J. Jessen, Anthony Zorich, and George Vaara as the Unemployment Compensation Commission of Alaska, defendants, United States Smelting, Refining and Mining Company, a corporation; Alaska Laundry, Inc., a corporation; Pacific American Fisheries, Inc., a corporation, Healy River Coal Corporation, a corporation; Juneau Spruce Corporation, a corporation; Ketchikan Spruce Mills, a corporation; and West-

ern Fisheries Company, a corporation; Wells Alaska Motors, a co-partnership; and Joe Coble, d/b/a The Pioneer Cab Company, and all others similarly situated, intervenors, came on regularly for trial, the plaintiff not being present in court but being represented by Stanley J. McCutcheon and Buell A. Nesbett, of his counsel, Herbert L. Faulkner, Edward Medley and J. Gerald Williams, appearing for and in behalf of the defendants and intervenors. The following proceedings were had, to-wit:

Opening statement to the Court was had by Stanley J. McCutcheon, for and in behalf of the Plaintiff.

Statement to the Court was had by Herbert L. Faulkner, for and in behalf of the defendants.

Lew M. Williams, being first duly sworn testified for and in behalf of the plaintiff.

A certified copy of Senate Bill No. 105 in the Legislature of the Territory of Alaska, Eighteenth Session was duly offered, marked and admitted as plaintiff's exhibit No. 1.

A certified copy of a letter dated March 27, 1947 to President of Senate Eighteenth Territorial Legislature, Territory of Alaska signed by Ernest Gruening, Governor of Alaska, with opinion by Ralph J. Rivers, Attorney General, Territory of Alaska, was duly offered, marked and admitted as intervenors exhibit "A".

Argument to the Court was had by Buell A. Nesbett, for and in behalf of the plaintiff.

At 11:12 o'clock a.m. Court continued cause to 11:20 o'clock a.m.

Entered Court Journal No. G 16 Page No. 293, Apr. 20, 1948. [42]

Now came the respective counsel as heretofore and the trial of cause No. A-4597, entitled Felton H. Griffin, plaintiff, versus R. E. Sheldon as Executive Director, Unemployment Compensation Commission of Alaska; Ernest F. Jessen, Anthony Zorich and George Vaara, as the Unemployment Compensation Commission of Alaska, defendants, United States Smelting, Refining and Mining Company, a corporation; Alaska Laundry, Inc., a corporation; Pacific American Fisheries, Inc., a corporation; Healy River Coal Corporation, a corporation; Juneau Spruce Corporation; Ketchikan Spruce Mills, a corporation, Western Fisheries Company, a corporation; Wells Alaska Motors, a co-partnership; and Joe Coble d/b/a The Pioneer Cab Company, and all others similarly situated, intervenors, was resumed.

Argument to the Court was had by Stanley J. McCutcheon, for and in behalf of the plaintiff.

At 11:47 o'clock a.m. Court continued cause to 1:45 o'clock p.m.

Entered Court Journal No. G 16 Page 294, Apr. 20, 1948. [43]

Now came the respective counsel as heretofore and the trial of cause No. A-4597, entitled Felton H. Griffin, plaintiff, versus R. E. Sheldon as Executive Director, Unemployment Compensation

Commission of Alaska; Ernest F. Jessen, Anthony Zorich and George Vaara, as the Unemployment Compensation Commission of Alaska, defendants, United States Smelting, Refining and Mining Company, a corporation; Alaska Laundry Inc., a corporation; Pacific American Fisheries Inc., a corporation; Healy River Coal Corporation, a corporation; Juneau Spruce Corporation; Ketchikan Spruce Mills, a corporation; Western Fisheries Company, a corporation; Wells Alaska Motors, a co-partnership; and Joe Coble d/b/a The Pioneer Cab Company, and all others similarly situated, intervenors, was resumed.

Argument to the Court was resumed by Stanley J. McCutcheon, for and in behalf of the plaintiff.

At 2:20 o'clock p.m. Court continued cause to 2:30 o'clock p.m.

Entered Court Journal No. G 16, Page No. 295, Apr. 20, 1948. [44]

Now came the respective counsel as heretofore and the trial of cause No. A-4597, entitled Felton H. Griffin, plaintiff, versus R. E. Sheldon as Executive Director, Unemployment Compensation Commission of Alaska; Ernest F. Jessen, Anthony Zorich and George Vaara, as the Unemployment Compensation Commission of Alaska, defendants, United States Smelting, Refining and Mining Company, a corporation; Alaska Laundry Inc., a corporation; Pacific American Fisheries Inc., a corporation; Healy River Coal Corporation, a corporation; Juneau Spruce Corporation; Ketchikan Spruce Mills, a corporation; Western Fisheries

Company, a corporation; Wells Alaska Motors, a co-partnership; and Joe Coble d/b/a The Pioneer Cab Company, and all others similarly situated, intervenors, was resumed.

Argument to the Court was resumed by Stanley J. McCutcheon, for and in behalf of the plaintiff.

Argument to the Court was had by Herbert L. Faulkner, for and in behalf of the intervenors.

At 3:45 o'clock p.m. Court continued cause to 3:55 o'clock p.m.

Entered Court Journal No. G 16, Page No. 295, Apr. 20, 1948. [45]

Now came the respective counsel as heretofore and the trial of cause No. A-4597, entitled Felton H. Griffin, plaintiff, versus R. E. Sheldon as Executive Director, Unemployment Compensation Commission of Alaska, et al., was resumed.

Argument to the Court was resumed by Herbert L. Faulkner, for and in behalf of the intervenors.

Argument to the Court was had by Edward Medley, for and in behalf of the intervenors.

Argument to the Court was had by J. Gerald Williams, for and in behalf of the defendants, as associate counsel and appearing for Ralph Rivers, Territorial Attorney General.

Argument to the Court was had by Buell A. Nesbett, for and in behalf of the plaintiff.

Argument to the Court was had by Stanley J. McCutcheon, for and in behalf of the plaintiff.

House Journals of Alaska for year 1947, 2 volumes, and volume Robert's Rules of Order, Re-

vised, were duly offered, marked and admitted as Court's exhibit No. 100, No. 101 and No. 102.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, announced it would reserve decision.

Entered Court Journal No. G 16, Page No. 295, Apr. 20, 1948. [46]

[Title of District Court and Cause.]

OPINION

McCutcheon & Nesbett, of Anchorage, Alaska, Attorneys for the Plaintiff.

Ralph J. Rivers, Attorney General of Alaska, Attorney for the Defendants.

H. L. Faulkner, of Juneau, Alaska, and Edward F. Medley, of Seattle, Washington, Attorneys for the Intervenor.

In this action the plaintiff challenges the validity of an Act of the Alaska Territorial Legislature passed at the 1947 session of that body and appearing in official print as Chapter [47] 74 of the Session Laws of Alaska, 1947. The defendant, R. E. Sheldon, is the executive director of the Unemployment Compensation Commission of Alaska and the defendants, Ernest F. Jessen, Anthony Zorich and George Vaara, are members of the Commission. The several intervenors are corporations having an interest in the outcome of this litigation

since they will be financially affected by the decision given herein.

The plaintiff brings this suit as a resident and taxpayer of Alaska. His averments to that effect in his complaint are admitted by the defendants' answer. The intervenors, but not the defendants, dispute the right of the plaintiff as a citizen and taxpayer to bring and maintain this action. While the issue was not raised by demurrer, the jurisdiction of the Court is questioned and, therefore, notice must be taken of it.

The action involves the validity of an amendment of one important feature of the Unemployment Compensation Act of Alaska. This Act bears such an intimate relation to the economic well being of the Territory that the fate of that portion of the Act which is here involved may well affect every citizen and taxpayer in the territory. The decision here given may conceivably sway the establishment of enterprise or the undertaking of employment in Alaska. Accordingly, the plaintiff as a citizen and taxpayer was eligible to bring, and is eligible to maintain, this action.

The Unemployment Compensation Act of Alaska was originally enacted at an extraordinary session of the Alaska Territorial Legislature held in 1937, and is Chapter 4 of the Session Laws of that session. At subsequent sessions of the legislature the law has been extensively amended, the latest enactment being that of 1947 which is here in issue. The original law, with the several amendments, covers all of the various features of [48] unemployment

compensation legislation and was enacted pursuant to federal legislation on the subject. Every aspect of unemployment compensation is evidently taken care of in the Act.

It is asserted in the plaintiff's amended complaint that the principal beneficiaries of the questioned legislation are "non-resident, seasonal employers, engaged in the fish and mining industries and not accountable for, nor concerned with, the economy of the Territory of Alaska." (Par. VII)

All such considerations are totally irrelevant. We are here concerned with the legal status of what appears to be a legislative act, and not with the wisdom or expediency of its enactment. Moreover, constitutions and statutes and the elementary principles of justice unite in the mandate that no discrimination be shown between residents and non-residents, between "Saints and Strangers."

Four grounds of invalidity of the Act of 1947 are urged:

(1) That the enacting clause of the law is inadequate because it does not conform with the requirements of Section 8 of the Act of August 24, 1912, 37 Stat. 514; 48, Sec. 76, U.S.C.A., which provides: "No law [enacted by the Alaska Territorial Legislature] shall embrace more than one subject, which shall be expressed in its title." The Act of August 24, 1912, is commonly known as the Organic Act of Alaska and will be hereinafter referred to as the Organic Act.

(2) That the bill was not lawfully passed by the House because a motion to reconsider duly and

regularly made was declared out of order and not voted upon by the House, in violation of the rules of the House. [49]

(3) That the bill was vetoed by the Governor and was not thereafter considered or voted upon by either House of the Legislature.

(4) That the bill in passage by the House did not have "three separate readings" as required by Section 13 of the Organic Act, 48 Sec. 85 U.S.C.A.

In order to understand several of the points involved it is necessary to give a history of the legislation.

The bill, known as Senate Bill No. 105, was introduced in the Senate and was considered by that body and passed in due course. It then came into the House on the 47th day of the session and was read the first time and referred to appropriate committees, House Journal page 648. In this connection it is to be noted that under the Organic Act, sessions of the legislature are limited to 60 days. On the 50th day of the session the committee reported the bill back to the House recommending enactment, House Journal, page 683. Not until the 55th day of the session was the bill brought up in the House for consideration and read the second time, House Journal, page 843, whereupon numerous amendments to the bill were offered and voted upon, House Journal, pages 843 to 848. At the conclusion of all the amendments we find the following: "It was moved by Mrs. Engstrom, seconded by Mr. D. Anderson, that the Rules be suspended as to Senate Bill No. 105, that it be considered re-engrossed, advanced to third reading, read

by number only and placed in final passage." House Journal, pages 848 and 849. Vote was thereupon taken and the rules were suspended and the bill passed by a vote of 16 yeas to 8 nays. The Journal recites that "Senate Bill No. 105 was read the third time by number only," page 849. [Emphasis supplied.] Later in the same day we find in [50] Journal, page 858, that one of the members, Mr. Barnett, who had voted in favor of the bill, "gave notice of his intent to move for a reconsideration of his vote" thereon. Thereupon it was moved by another member that the rules be suspended and that the bill be reconsidered immediately, but this motion failed of passage by a vote of 13 yeas to 10 nays, a two-thirds vote being required to pass. And so the vote on the bill was not then reconsidered, House Journal page 858.

On the following day, the 57th of the session, we find a Journal entry, page 872, indicating that a message from the Senate was read transmitting the enrolled copy of Senate Bill No. 105 for the signatures of the Speaker and the Chief Clerk of the House and that the Speaker announced he had signed the enrolled copy of Senate Bill 105 and ordered the same returned to the Senate. Later in the same day, Mr. Barnett, who had theretofore given notice of his intent to ask for reconsideration of the bill, moved that it be reconsidered at that time. The Speaker ruled the motion out of order. An appeal was taken from the ruling of the chair. That ruling was put to the House and the decision of the Chair was sustained by a vote of 14 yeas to 8 nays, House Journal page 881.

On that same day, the 57th of the session, and probably before the motion to reconsider was brought up in the House, the Senate had ordered the bill to be transmitted to the Governor, Senate Journal page 678. Apparently it was so transmitted because on the 59th day of the session, in the afternoon, a message from the Governor to the President of the Senate was read to the Senate, Senate Journal pages 715, et seq. Singularly enough, the Governor's message, except for a letter from the Attorney General therein quoted, is not printed in the Senate Journal, but it [51] appears in the House Journal, page 998. Evidently the Governor returned the bill to the Senate because of the failure of the House to dispose of the motion for reconsideration before the bill was sent to the Governor, as appears by letter from Attorney General Rivers to the Governor, Senate Journal page 715, House Journal page 998. The Senate voted to return the bill to the Governor immediately, Senate Journal page 717, and it seems clear that action was taken accordingly.

The House Journal of March 27, 1947, the 60th and last day of the session, shows the reading of a message from the Governor, House Journal page 997, which is dated that day, wherein the Governor, in part, states: "I have transmitted Senate Bill No. 105 to the Office of the Secretary of Alaska for permanent filing. Senate Bill No. 105 becomes law without my signature. * * *"

The foregoing recital embraces mention of the several days of the session at which the bill in the

various stages was considered by the House and the Senate because of the provisions, hereinafter quoted, of Section 14 of the Organic Act, 48 Sec. 86 U.S.C.A., with respect to the Governor's veto power.

Is the subject of the act expressed in the title?

The mandate of our Organic Act that the subject of each legislative act must be expressed in the title may not be ignored as inconsequential or irrelevant, *Territory of Alaska v. Alaska Juneau Gold Mining Company*, 9 Alaska, pp. 360, 557, but the word "subject" should receive a construction that appears reasonable to literate men and women, *Wickersham v. Smith*, 7 Alaska 522, 543, from which the following is quoted:

"It is universally held that the title of an act which is attacked for a violation of this constitutional provision shall be construed liberally, for the purpose of upholding the law, if practicable, so as not to embarrass the Legislature by a construction unnecessary [52] to the accomplishment of the beneficial purposes for which it was enacted."

As was observed by the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Hidalgo & Cameron Counties Water Control v. American Rio Grande Land & Irrigation Company*, 103 F. 2d, 509, 512:

"The purpose of the constitutional provision is to prevent combining several unrelated subjects into one bill to get support for it which the several subjects might not separately command; and to prevent surreptitious introduction of legislation not indicated by the title."

The Circuit Court of Appeals for the Ninth Circuit in the case of *In re Boswell*, 96 F. 2d, 239, has arrived at substantially the same conclusion, and in the case of *Utah Power and Light Company v. Pfof*, 286 U. S., 165, 187, we find the following:

“Section 16, Art. III, of the Idaho Constitution provides—‘Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.’ * * * The purpose of the constitutional provision, as this court said in *Posados v. Warner, B. & Co.*, 279 U. S. 340, 344, ‘is to prevent the inclusion of incongruous and unrelated matters in the same measure and to guard against inadvertence, stealth and fraud in legislation. . . . the courts disregard mere verbal inaccuracies, resolve doubts in favor of validity, and hold that, in order to warrant the setting aside of enactments for failure to comply with the rule, the violation must be substantial and plain.’ ”

Applying the law as stated above, the “subject” of the legislation here in question is adequately expressed in the title of the Act.

The other three grounds of the alleged invalidity of the Act, namely, (a) failure to dispose of motion to reconsider in the House, in contravention of the Rules of the House; (b) veto of the bill by the Governor; and (c) failure to read the bill three times as required by the Organic Act, could each and all be disposed of speedily, and in favor of the validity of the Act, had the Governor actually signed the bill in approval thereof. Such [53] a

decision would be arrived at, and, indeed, compelled, by the controlling authority of the Supreme Court of the United States expressed in the case of *Field v. Clark*, 143 U. S., 649, wherein it was held that an enrolled bill signed by the Speaker of the House, and the President of the Senate, and bearing the approving signature of the President of the United States, and deposited with the Secretary of State according to law, was final and conclusive evidence of its status as a law, and was "unimpeachable," page 672, and in the case of *Lyons v. Woods*, 153 U. S. 649, 663, which applied the law so laid down in *Field v. Clark* to an act of a Territory of the United States. See also, *Carlton v. Grimes*, Ia. 1946, 23 NW 2d, 883, 892. The division of judicial opinion on the subject is outlined in Volume 1 of *Sutherland on Statutory Construction*, 3d Ed., pages 223 to 236, and in *Ritzman v. Campbell*, Ohio 1915, 112 NE 591, 593. However, it appears that in the Supreme Court the doctrine of *Field v. Clark* has not been departed from.

But in this case the enrolled bill upon its face shows that it was not signed by the Governor, nor is there anything in the enrollment to show that it became law without the Governor's approving signature. Introduced in evidence among the exhibits of the case is a certified copy of what purports to be a carbon copy of a letter dated March 27, 1947, written by the Governor to the President of the Senate, containing the declaration that "Senate Bill No. 105 becomes law without my signa-

ture," the same letter, or message, which is found in the House Journal at page 997. There is nothing in that certified copy nor in the certificate thereof to show conclusively that the Governor ever wrote or signed such a letter or that the declarations therein set out are controlling with respect to the bill mentioned. Only by [54] reference to the Journals of the House and the Senate can adequate assurance be found that the bill may have become law without the Governor's signature. Since it is necessary to refer to the Journals in an attempt to establish the validity of the Act, it obviously becomes the duty of the Court to give full examination to all of the Journal entries, to determine whether the bill was lawfully enacted. If reference must be made to the Journals at all, then that reference should be complete and comprehensive for all proper purposes, and the conclusive and "unimpeachable" presumption that the questioned legislative act is valid law, arising from the production of the enrolled bill signed by the Speaker of the House and the President of the Senate and by the Governor in approval thereof, is completely overthrown.

Instead of saying at this point, as might have been said if the Governor had signed the bill, that none of the objections to the Act, other than that involving the title, can be entertained because they are conclusively denied by the enrolled bill itself, it is thus necessary to consider and decide the three additional grounds upon which the plaintiff says the law is void.

Refusal of Vote of Reconsideration

Rule 48 of the House Rules concerning reconsideration of bills is shown in the House Journal pages 1030, 1031, as follows:

“No motion, bill, resolution or memorial shall be reconsidered on the day on which the final vote was taken, but it shall be in order, on that day, for a member, who voted on the prevailing side, to give, and have entered in the Journal, a notice of intention to move a reconsideration.

“When such notice is given any member may, on the next working day, move a reconsideration of the question. The motion for reconsideration opens for debate the question to be reconsidered and shall have precedence over every other motion except a motion to adjourn.

“No notice or reconsideration shall be in order, on the day preceding the last day of the session.

“There shall be but one reconsideration, even though the action of the House after reconsideration is opposite the action of the House before reconsideration.

“If a member gives notice that he intends to move a reconsideration, the Clerk shall not report the measure to the Senate until the reconsideration is disposed of, or the time for moving the same has expired.”

It is clear that the House itself ignored the provisions of Rule 48 with respect to the enactment of Senate Bill No. 105. A member gave due notice of his intention to move for reconsideration according to Rule. On the following day as required

by the Rule he brought up the motion, but the Speaker held that the motion was out of order, apparently on the theory that the bill had already been returned to the Senate. In fact, it seems virtually certain that the Senate had already forwarded it to the Governor. Whereupon another member of the House appealed from the ruling of the Chair and upon that appeal the Chair was sustained. The action so taken brought into play the provisions of Rule 83, House Journal page 1041, which reads as follows:

“The rules of parliamentary practice comprised in Roberts’ Rules of Order shall govern in all cases in which they are not inconsistent with the standing rules and orders of the House.”

Consulting Roberts’ Rules of Order, as we are required to do by Rule 83 above quoted, at pages 81 and 82, we find the following:

“If the decision from which an appeal is taken is of such a nature that the reversal of the ruling would not in any way affect the consideration of, or action on, the main question, then the main question does not adhere to the appeal, and its consideration is resumed as soon as the appeal is laid on the table, postponed, etc. But if the ruling affects the consideration of, or action on, the main question, then the main question adheres to the appeal, and when the latter is laid on the table, or postponed, the main question goes with it. Thus, if the appeal is from the decision that a proposed amendment is out of order and the appeal is laid on the table, it would be absurd to come to final action

on the main question and then afterwards reverse the decision of the chair and take up the amendment when there was no question to amend. The vote on an appeal may be reconsidered." [56]

Applying these provisions of Roberts' Rules of Order, we find that the House, in effect, by sustaining the decision of the Chair, did vote on the motion to reconsider.

The reluctance of courts to pronounce legislative acts void solely because of violation of legislative rules of procedure, as distinguished from controlling constitutional or statutory provisions, is noted and supporting cases cited in Volume 1 of Sutherland on Statutory Construction, pages 122 to 124, Section 601; also in *Carlton v. Grimes*, *supra*.

Rule XVIII of the Rules of the National House of Representatives provides that:

"When a motion has been made and carried or lost, it shall be in order for any member of the majority, on the same or succeeding day, to move for reconsideration thereof * * *" House Rules and Manual 77th Congress, page 374.

The notes following the printing of the rule in the House Rules and Manual show the following, based largely, if not entirely, upon Hinds' and Cannon's Precedents of the House of Representatives, pages 376, 377:

"A motion to reconsider may be entertained, although the bill or resolution to which it applies may have gone to the other House or the President, (V, 5666-5668)."

* * * *

“A bill is not considered passed or an amendment agreed to if a motion to reconsider is pending, the effect of the motion being to suspend the original proposition (V, 5704); and the Speaker declines to sign an enrolled bill until a pending motion to reconsider has been disposed of (V, 5705). But when the Congress expires leaving unacted on a motion to reconsider the vote whereby a simple resolution of the House has been agreed to, it is probable that the resolution would be operative; and where a bill has been enrolled, signed by the Speaker, and approved by the President, it is undoubtedly a law, although motion to reconsider may not have been disposed of (V, 5704, footnote).” [57]

Reference to the footnote mentioned indicates that the last clause of the above quoted text is based in part upon opinions of two Speakers of the House given after adjournment and therefore not official, and in part on the opinion of the Court in *Field v. Clark*, *supra*.

In Congress the practice is to make and dispose of motion to reconsider immediately upon passage of the bill. For example, as soon as a bill is passed, one who voted in favor of passage moves to reconsider the bill, and immediately another member, also favorable to passage, moves to lay the motion to reconsider on the table. In the House the matter may be disposed of by a statement of the Speaker as follows: “The bill is passed and without objection a motion to reconsider is laid on the table.”

It follows that, under the circumstances, in the case of Senate Bill No. 105, the failure of the House to directly vote on the motion to reconsider is not fatal to the validity of the Act.

Was the Bill Vetoed by the Governor?

With respect to veto of bills passed by the Alaska Territorial Legislature, the Organic Act, Section 14, 48 Sec. 86, U.S.C.A., provides as follows:

“Except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor. Every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature. If the governor does not approve such bill, he may return it, with his objections, to the legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. Upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal [58] and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes, which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become a law. If the governor neither signs nor

vetoed a bill within three days (Sundays excepted) after it is delivered to him, it shall become a law without his signature, unless the legislature adjourns sine die prior to the expiration of such three days. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law.”

The language above quoted is entirely orthodox. Similar provisions, with variations in particulars, may be found in the Constitutions of the several States and in the Constitution of the United States. While argument has been made in favor of the asserted veto of the bill, supported by authority, *State v. Sessions*, Kan. 1911, 115 Pac. 641, 645, it is completely overcome by the declarations of the Governor himself above quoted and appearing at page 997 of the House Journal. In such case where the actions of the Governor are susceptible of two different constructions, his own statements on the subject must control.

Accordingly, the conclusion is that the bill was not vetoed by the Governor.

Three Separate Readings

The Organic Act, Section 13, provides that a bill in order to become a law shall have three separate readings in each House. The House Rules, Rule 65, provides that:

“The first reading shall be by title only, unless otherwise ordered by the House, * * *”

With respect to the second reading of the bill, Rule 68 shows the following:

“When the bill comes up for its second reading the Clerk shall read the bill and the report of the committee in full, section by section, and it shall then be before the House for debate and amendment.” [59]

Rule 70, below quoted, gives directions as to the third reading of the bill:

“On its third reading the bill shall be read in full, section by section. The only question on the third reading of a bill shall be upon its passage and no amendment shall be entertained—but the House may at any time before the final passage of the bill, by a majority vote of all the members to which it is entitled, recommit the bill with instructions to amend.”

The House Journal, page 648, recites that Senate Bill No. 105 was read the first time and referred to the Committee on Judiciary and Federal Relations with a further reference to the Committee on Labor, Capital and Immigration. The second reading of the bill is shown at page 843 of the House Journal in the following language:

“Senate Bill No. 105 was read the second time.”

The pages of the Journal following page 843 show that several amendments were offered to the bill and that those amendments were voted upon and defeated. Common knowledge of legislative practice raises the inference that the amendments

were debated. Counsel for the intervenors argue that the entire bill must have been read during this debate, but nothing in the Journal so indicates.

Now, we are brought forward to the third reading and final passage of the bill. We find from the Journal, pages 848 and 849, that a member of the legislature moved for suspension of the rules that the bill "be considered re-engrossed, advanced to third reading, read by number only and placed in final passage." A vote was taken upon the proposal to suspend the rules which was carried by two-thirds majority, whereupon we find in the Journal, page 849, the following:

"Motion carried and Senate Bill No. 105 was read the third time by number only." (Emphasis supplied.) [60]

As indicated above, Rule 70 of the House Rules requires that on its third reading the bill shall be read in full, section by section. Assuming without deciding that the failure to read a bill section by section on its third reading is not fatal to its validity, we are obliged to ask whether the reading of a bill by number only is such a reading as is contemplated by Section 13 of the Organic Act. On that point no controlling decision has been found. In fact, no adjudicated case has been discovered involving the validity of the statute where one of the readings of the bill prescribed by the Constitution was by number only. It seems reasonable to assume that in passing the Organic Act and providing therein for three separate readings of bills in the Alaska Territorial Legislature, Congress

had in view its own procedure, and that procedure is that the first and third readings of the bill are invariably by title only, and in the second reading alone is the bill read at length and section by section. In fact, in the House of Representatives a practice of "Scientific Reading", as it is called, is sometimes permitted whereby, if there is no objection, a bill of considerable length is read in a startlingly brief period of time.

The decisions on the subject are not uniform. In the case of *Weill v. Kenfield*, 54 Cal., 18 Pac. St. Rep., 111, the Court held that reading a bill meant reading all of it. But elsewhere we find the opposite doctrine announced, in harmony with the practice of the national Congress: *People ex rel Hart v. McElroy*, Mich. 1888, 2 LRA 609; *Central of Georgia Railway Co. v. State of Georgia*, Ga. 1898, 42 LRA 518; *Kentucky-Tennessee Light & Power Co. v. City of Paris*, 9th Cir. 1931, 48 F. 2d, 795. Moreover, common knowledge indicates that in the Alaska Legislature the third reading of a bill until the 1947 session almost invariably [61] had been by title only. To require more without some specific controlling law or rule on the subject would be to ignore the uniform practice and to measurably abandon the authority of common sense. But what may be said of a reading of a bill by number only? In the instant case, Senate Bill No. 105, the bill had evidently been under discussion for a considerable period of time before the motion was made to suspend the rules to pass the bill. Although the bill was read the third time by num-

ber only, it seems almost certain that every member who voted on the passage of the bill knew precisely what he was voting upon. But instances may be conceived of in which a bill comes before one of the Houses of the Legislature not so debated and discussed, when to read the bill by number only would give its members no idea of the contents. In this connection we may again properly consider the provisions of the Organic Act that the subject of the bill shall be expressed in the title. Therefore, in the Alaska Legislature to read the title of a bill is indisputably to inform every member the subject of the measure which is thus brought up for vote. Neither the research of counsel nor that of the Court has been able to disclose a single case wherein the bill challenged was read by number only.

In argument it was urged upon the Court that to hold void the Act under consideration, would establish a precedent that might invalidate many other acts passed at the same session of the Legislature. A reference to the House Journal discloses that other bills were read the third time by number only. Usually it was done by unanimous consent, but that was not the case with respect to Senate Bill No. 105. The unanimous consent would, of course, completely negative any objection to the validity of the law on the ground that it had not been read properly the required [62] number of times as provided by the Rules of the House. Former Vice President Garner has been quoted as having said that the Senate could do anything—legis-

lately, of course—by unanimous consent except amend the Constitution of the United States. In any event, the effect of the decision in this case on other acts of the legislature ought not be a controlling influence in its making. Moreover, it may be finally shown that all such other acts as to which the third reading was by number only are so signed, approved and enrolled as to be “unimpeachable” under the authority of *Field v. Clark*, *supra*.

The Organic Act of Alaska is in a sense the Constitution of the Territory. Its commands must be adhered to with reasonable fidelity by the legislature as to enactment of legislation as well as in other respects. Making every allowance that ought to be made in favor of liberality of construction, no convincing reason has been offered, or even attempted, to justify the reading of a bill by number only as one of the three readings required by Section 13 of the Organic Act. Counsel for the intervenors vigorously assert that during debates in the proposal of amendments the bill must have been read several times, but that is only their conclusion. There is nothing in the Journal to show the reading of anything except the amendments, though it does seem probable that in comparing the amendments with the text of the bill as reported by the committee, the members must have been familiar with every provision of the bill. But that is not sufficient, since in this case reference must be made to the Journal and the Journal affirmatively shows that there was no third reading of the bill as required by Section 13 of the Organic Act. Failure

to read the bill the third time as required by the [63] Organic Act is fatal to its validity. For that reason only, the Act of the Alaska Territorial Legislature of the 1947 session which in the passing was known as Senate Bill No. 105 and which appears as Chapter 74 of the Session Laws of Alaska, 1947, is now held to be void and of no effect. Findings and decree may be prepared accordingly.

Dated at Anchorage, Alaska, this 28th day of June, 1948.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed June 28, 1948. [64]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now the defendants and intervenors and each of them acting through their respective counsel move this Honorable Court for judgment for defendants and intervenors herein or in the alternative for a new trial in the above entitled cause upon the following grounds:

1. Accident or surprise which ordinary prudence could not have guarded against.

2. Newly discovered evidence material to the case of defendants and intervenors which could not with reasonable [65] diligence have been discovered and produced at the trial.

3. Insufficiency of the evidence to justify the decision.

4. That the decision is against law in that:

(a) A distinction is made between reading a bill by title and reading a bill by number.

(b) A distinction is made between cases where the chief executive signs a bill and cases where he permits a bill to become law without his signature.

(c) The Court failed to take judicial notice and to find as a matter of fact that Senate Bill Number 105 was passed by both Houses of the Territorial Legislature, permitted to become law by the Governor, transmitted by the Governor to the Secretary of Alaska for permanent filing, received by the Secretary of Alaska and by him permanently filed and published and proclaimed by him to be a law of the Territory of Alaska, and did fail to conclude as a matter of law that such action was final and conclusive evidence of its status as a law.

5. Error in law occurring at the trial and accepted to or to be accepted to by defendants and intervenors as set out in Number 4 above.

This motion is based upon the records and files of this cause and upon the Affidavit of J. Gerald Williams, of counsel for defendants and intervenors, with exhibits attached, filed herein.

Dated at Anchorage, Alaska, this 19th day of July, 1948.

FAULKNER & BANFIELD,
MEDLEY & HAUGLAND,
W. C. ARNOLD,
J. GERALD WILLIAMS,
Attorneys for Intervenors. [66]

RALPH J. RIVERS,
J. GERALD WILLIAMS,
Attorneys for Defendants.

(Acknowledgment of Service attached.)

[Endorsed]: Filed July 19, 1948.

[67]

[Title of District Court and Cause.]

AFFIDAVIT OF J. GERALD WILLIAMS

United States of America,
Territory of Alaska—ss.

J. Gerald Williams, being first duly sworn on oath, deposes and says:

That I am an attorney at law and of counsel for defendants and intervenors in the above entitled case and participated in the preparation for trial and in the trial thereof.

1. That defendants and intervenors and counsel for defendants and intervenors were taken by surprise by the written decision filed in the above entitled cause on June 28, [68] 1948; that defendants and intervenors and their counsel had been confident that the Court, under the rule of Judicial Notice and in view of the state of the pleadings and stipulations of Counsel, would take judicial notice of the following facts:

(a) That the Honorable Ernest W. Gruening, Governor of Alaska, did on March 27, 1947, address a written communication to the President of the Territorial Senate containing the declaration that: "Senate Bill No. 105 becomes law without my signature", and did transmit a true copy of said communication of March 27, 1947, to the Secretary of Alaska, with and as a part of the enrolled copy of Senate Bill No. 105; a photostatic copy of said communication as certified by the Auditor of Alaska is hereto attached, marked Exhibit "A" and made a part hereof.

(b) That the said Ernest W. Gruening, Governor

of Alaska, did likewise on the said 27th day of March, 1947, address an identical written communication to the Speaker of the House of Representatives containing the declaration that: "Senate Bill No. 105 becomes law without my signature", as appears from the Affidavit of Ernest Gruening hereto attached marked Exhibit "B" and made a part hereof.

(c) That the said Ernest W. Gruening, Governor of Alaska, acting pursuant to the provisions of the Organic Act of Alaska, did on the 27th day of March, 1947, permit Senate Bill No. 105 (Chapter 74 of the Session Laws for 1947) to become a law of the Territory of Alaska without his signature and did transmit the engrossed and enrolled copy thereof, with a true copy of a letter to the President of the Territorial Senate stating that said bill was becoming a law without his signature, to the Honorable Lew Williams, Secretary of Alaska, for permanent filing. [69]

(d) That the Honorable Lew Williams (Secretary of Alaska, acting pursuant to law, did on or about March 27, 1947, receive from the Governor of Alaska the enrolled and engrossed copy of Senate Bill No. 105 passed by both houses of the Territorial Legislature and bearing the signatures of the President of the Territorial Senate and the Speaker of the Territorial House of Representatives and attested by the Secretary of said Senate and the Clerk of said House, respectively, together with a true copy of the communication of March 27, 1947, referred to in "a" above and did combine said documents together and permanently filed the same as

the enrolled and engrossed copy of Senate Bill No. 105 enacted into law at the Eighteenth Session of the Alaska Territorial Legislature; a photostatic copy thereof, together with the Certificate of the Secretary of Alaska attesting the correctness thereof, is hereto attached, marked Exhibit "C" and made a part hereof.

(e) That the Honorable Lew Williams, Secretary of Alaska, acting pursuant to law, did on the 23rd day of May, 1947, at Juneau, the Capitol of the Territory of Alaska, certify under the great seal of the Territory of Alaska, that certain Acts, Resolutions and Memorials, including Senate Bill No. 105 (Chapter 74 of the Session Laws of Alaska for 1947), printed under authority of Section 1935 of the Compiled Laws of Alaska, 1933, as amended, were full, true and correct copies of the original Acts, Resolutions and Memorials which were passed at the 18th Regular Session of the Alaska Territorial Legislature as shown by said original Acts, Resolutions and Memorials on file in the Office of the said Secretary of Alaska, and did publish and proclaim under the great seal of the Territory of Alaska, said Acts, Resolutions and Memorials, including Senate Bill No. 105 [70] (Chapter 74 of the Session Laws of Alaska for 1947) to be law; all as fully appears in the Authentication Certificate found on the fly leaf or third unnumbered page of the Session Laws of Alaska for 1947.

(f) That proof of the facts set forth in (a), (b), (c), (d) and (e) above would have been offered at the trial except for the fact that in view of the

stipulation of counsel filed herein and the rule of Judicial Notice Counsel for defendants and intervenors relied upon the Court taking Judicial Notice thereof.

2. That since reading and studying the Court's opinion herein, affiant and other counsel for defendants and intervenors, have, in light of the Court's reasoning and opinion, conducted further research into the actions and proceedings taken by the Governor of Alaska, Secretary of Alaska, the members of the Territorial Legislature and other Federal and Territorial officials relative to the enactment of laws at the 18th Session of the Alaska Territorial Legislature. That affiant is informed on information and belief and therefore alleges on information and belief that the Governor of the Territory of Alaska and/or the Secretary of Alaska, acting pursuant to the Organic Act of Alaska (Sections 482, 483 and 484 Compiled Laws of Alaska for 1933), did transmit true copies of Senate Bill No. 105 (Chapter 74 of the Session Laws of Alaska for 1947) to the President of the United States and to the Secretary of State for the United States, and acting on behalf of the President of the United States did transmit same to the President of the United States Senate and to the Speaker of the House of Representatives; that said copies were certified by the Secretary of the Territory of Alaska with the seal of the said Territory affixed and were by him proclaimed to be the laws of the Territory of Alaska enacted at the 18th Session of the Alaska Territorial Legislature. [71]

3. That affiant is informed and believes and therefore alleges on information and belief that the original copy of the letter of March 27, 1947, written by the Honorable Ernest W. Gruening, Governor of Alaska, and addressed to the President of the Territorial Senate and containing the declaration that: "Senate Bill No. 105 become law without my signature", and having the true signature of the Governor of Alaska affixed thereto is now in the custody of the Auditor of Alaska.

4. That the matters and things hereinabove set forth are true and if a new trial is granted, the same will be proved by competent evidence.

5. That affiant believes and has also been advised by other counsel for defendants and intervenors that upon a new trial and rehearing of argument in the above cause new authorities can be presented which will establish that the opinion of the Court, filed herein on June 28, 1948, is not supported by the evidence and is against law and was arrived at by error in law occurring at the trial.

/s/ J. GERALD WILLIAMS.

Subscribed and sworn to before me this 19th day of July, 1948.

/s/ FLORENCE E. CHAPMAN,
Notary Public for Alaska.

My Commission expires April 5, 1952.

Service of the Foregoing Affidavit by receipt of copy thereof acknowledged on this 19th day of July, 1948. Signed SMc, Attorney for the Plaintiff. [72]

EXHIBIT "A"

Territory of Alaska
Office of the Auditor
Juneau

CERTIFICATE

I, Frank A. Boyle, Auditor of the Territory of Alaska, Do Hereby Certify that the following and hereto attached is a full, true and correct copy of a letter written by Ernest Gruening, Governor of Alaska to the President of the Territorial Senate of Alaska, dated March 27th, 1947. That the 1947 Session of the Legislature of Alaska adjourned sine die on March 28th, 1947 and thereafter all the original records such as communications were deposited in the office of the Auditor of Alaska. All original Bills which became law are in the office of the Secretary of Alaska.

That the hereto attached letter from the Governor to the President of the Senate is now in my custody. That I am well acquainted with the signature of Ernest Gruening, Governor of Alaska and that the signature on the original letter of which the foregoing is a full copy, is the true and genuine signature of Ernest Gruening, Governor of the Territory of Alaska, and that he was, at the date of the letter and now is, the duly appointed and acting and qualified Governor of Alaska.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at Juneau, the Capital, this 9th day of July, A.D. 1948.

(Seal)

/s/ FRANK A. BOYLE,

Auditor of Alaska. [73]

March 27, 1947

You will note that the Attorney General rules that final action had not been taken on the bill at

the time it was transmitted to me, and the present record so shows. To obviate possibility of litigation based on such irregularity, I am returning it to you so that it may again be sent to me with a new message of transmittal which should cure the matter.

Sincerely yours,

/s/ ERNEST GRUENING,
Governor of Alaska."

"Hon. Ernest Gruening
Governor of Alaska
Juneau, Alaska

March 25, 1947

Dear Governor Gruening:

[74]

In response to your request for an opinion as to validity of legislative procedure preceding transmittal to you yesterday of S. B. 105, please be advised:

According to the House Journal, at 10:30 p.m. March 22d, the 55th day of the 18th Session, the House suspended the rules as to S.B. 105, it was advanced to third reading and adopted by a vote of 17 yeas and 7 nays, Mr. Barnett voting on the prevailing side. Shortly thereafter the Speaker announced he had signed the bill and that it had been transmitted to the Senate. Later that night and before adjournment, Mr. Barnett gave notice of his intent to move for reconsideration of his vote on S.B. 105. A motion to force immediate reconsideration failed. Shortly thereafter the House adjourned until 10 o'clock, March 24th, the next day being

Sunday, and not a working day. Under House Rule 48, which allows the motion for reconsideration to be made on the next working day, Mr. Barnett was entitled to make his motion for reconsideration at any time during the session on Monday, March 24th, so the bill should have been recalled and kept in the possession of the House until disposition of the matter or adjournment. Such procedure is required under House Rule 48, which provides:

‘If a member gives notice that he intends to move a reconsideration, the Clerk shall not report the measure to the Senate until the reconsideration is disposed of, or the time for moving same has expired.’

It should also be noted that the motion for reconsideration opens for debate the question to be reconsidered, which affects the rights of all the members.

Notwithstanding House Rule 48, S. B. 105 was not called back from the Senate. At 2:45 p.m. of the 24th of March the Senate sent the bill to the Governor. About 4:45 of the same day the motion for reconsideration was made by Mr. Barnett. The Speaker ruled the motion out of order, expressing reasons hereinafter noted, and was sustained by vote of the House.

The Speaker’s expressed reason, when ruling the motion for reconsideration out of order, was that S. B. 105 was no longer in the House and came under the rule that only bills of a revenue or appropriation nature would be considered after the 56th day, Monday the 24th, being the 57th day.

S. B. 105, which amends the UCC law to provide an experience rating formula, grants credits to employers against the 3% UCC tax and affects revenues to the Territorial [75] Unemployment Compensation Fund to the extent of approximately a million dollars a year. The bill also shortens the waiting period for unemployed persons from two weeks to one week, which substantially affects the benefits that may be paid out of the Unemployment Compensation Fund. Therefore, S. B. 105 is a bill of a revenue nature and eligible to be considered and transmitted after the 56th day without suspending the rules.

I have reasons to believe that legal authority in the Senate agrees that S. B. 105 is a revenue measure in character and apparently many members in the House think likewise as it admitted S. B. 117 (exempting certain fishermen from liability as contributors under the UCC law) on the grounds that S. B. 117 is a revenue measure. Since both S. B. 105 and S. B. 117 amend the UCC law to reduce contributions, they are both of the same character from a revenue standpoint.

The question to be considered is whether the transmittal of S. B. 105 by the Senate to the Governor about two hours before the House took final action on the motion for reconsideration constituted a valid transmittal of a bill duly passed by both houses. It is a matter of simple logic that no bill can be validly transmitted as an enactment of both houses prior to completion of all legislative steps pertaining thereto. Therefore, in all prob-

ability, S. B. 105 in its present condition would be productive of litigation unless sent back for valid transmittal to the Governor.

Very truly yours,

/s/ RALPH J. RIVERS,
Attorney General."

The Senate, however, took the position that the proceedings were in order.

There is a second reason why I desire not to sign this bill. It will be recalled that in my message to the Eighteenth Legislature, after reviewing the Territory's pressing needs and the great variety of untapped tax sources from which revenue could easily be secured, I pointed to the example of the Unemployment Compensation tax as an illustration of how wise forethought brought dividends. I pointed out that Unemployment Compensation was established by the Territorial Legislature ten years ago in connection with the Federal government Social Security program.

After ten years, the fund had risen to a point where the tax on employers could be substantially reduced. This was a sound [76] proposal, and while this bill which puts it into effect is not by any means as good as it could be, the basic purpose which I outlined in my message has been fulfilled by it.

However, it is somewhat startling that we have passed up various forms of basic taxation which would bring in sorely needed revenue, and have adopted the one measure which would refund rev-

enue. In exchange for this handsome refund which will probably amount to one million dollars for the biennium and more in succeeding bienniums, the people of the Territory had a right to expect that industry and other hitherto untaxed activities would be willing to submit to some of the light taxation that was proposed, to take care of the Territory's pressing needs. This, however, has not been the case, and it is for the purpose of calling attention to this marked discrepancy that I am allowing Senate Bill No. 105 to become Law without my signature.

Sincerely yours,

/s/ ERNEST GRUENING,

Governor of Alaska.

[77]

EXHIBIT "B"

(Copy)

United States of America,
Territory of Alaska—ss.

I, the undersigned Ernest Gruening hereby certify that I am Governor of the Territory of Alaska and that I was Governor of the Territory on March 27, 1947; and on that date I wrote a letter to the Speaker of the House of Representatives and an identical letter to the President of the Senate of the Eighteenth Territorial Legislature with reference to Senate Bill No. 105 which is now Chapter 74 of the Session Laws of Alaska 1947. That the letter is set forth in full at pages 997 to 1001 of the Journal

of the House for the year 1947 and a carbon copy of the letter is filed with the original Bill in the office of the Secretary of Alaska. That the copy as set forth in the House Journal and the copy attached to the original Senate Bill No. 105, Chapter 74 Session Laws of Alaska 1947 in the office of the Secretary of Alaska, are full, true and correct copies of the letter, and that it was signed by me as Governor of Alaska on March 27, 1947, and the signature on the original of that letter is my true and genuine signature.

/s/ ERNEST GRUENING.

Subscribed and sworn to before me this 8th day of July, 1948.

(Seal) /s/ RALPH J. RIVERS,
Notary Public for Alaska.

My Commission Expires 9/14/51. [78]

EXHIBIT "C"

Office of the Secretary for the Territory
Juneau, Alaska

United States of America,
Territory of Alaska—ss.

I, Lew M. Williams, Secretary of Alaska, Do Hereby Certify that I have compared the attached copy of Chapter 74, Session Laws of Alaska, 1947, with the original Act, Senate Bill 105, signed by the presiding officers of the House and Senate of the Eighteenth Alaska Territorial Legislature, and now on permanent file in my office, and that the within

and attached copy is a full, true and correct copy of said original Act.

I Further Certify that I have compared the attached copy of letter with carbon copy of letter, now on file in my office, dated March 27, 1947, addressed to The President of the Senate, Eighteenth Territorial Legislature, Juneau, Alaska, from Ernest Gruening, Governor of Alaska, which said carbon copy of letter accompanied Senate Bill 105, now Chapter 74 S.L.A. 1947, when said Senate Bill 105, now Chapter 74 S.L.A. 1947, was received in the office of the Secretary of Alaska for permanent filing from the Office of the Governor, and that said attached copy of letter is a full, true and correct copy of said carbon copy of letter now on file in my office.

In Witness Whereof, I have hereunto set my hand and the Seal of the Territory of Alaska this seventh day of July, A.D. 1948.

(Seal) /s/ LEW M. WILLIAMS,

Secretary of Alaska.

[79]

Territory of Alaska
Office of the Governor
Juneau

President of the Senate
Eighteenth Territorial Legislature
Juneau, Alaska

Dear Mr. President:

I have transmitted Senate Bill No. 105 to the Office of the Secretary of Alaska for permanent

"President of the Senate **March 26, 1947**
Eighteenth Territorial Legislature

Dear Mr. President:

You will note that the Attorney General rules that final action had not been taken on the bill at the time it was transmitted to me, and the present record so shows. To obviate possibility of litigation based on such irregularity, I am returning it to you so that it may again be sent to me with a new message of transmittal which should cure the matter.

/s/ ERNEST GRUENING,
Governor of Alaska.”

“Hon. Ernest Gruening

Governor of Alaska

March 25, 1947

Juneau, Alaska

Dear Governor Gruening:

In response to your request for an opinion as to validity of legislative procedure preceding transmittal to you yesterday [80] of S. B. 105, please be advised:

According to the House Journal, at 10:30 p.m. March 22d, the 55th day of the Eighteenth Session, the House suspended the rules as to S. B. 105, it was advanced to third reading and adopted by a vote of 17 yeas and 7 nays, Mr. Barnett voting on the prevailing side. Shortly thereafter the Speaker announced he had signed the bill and that it had been transmitted to the Senate. Later that night and before adjournment, Mr. Barnett gave notice of his intent to move for reconsideration of his vote on S. B. 105. A motion to force immediate reconsideration failed. Shortly thereafter the House adjourned until 10 o'clock, March 24th, the next day being Sunday, and not a working day. Under House Rule 48, which allows the motion for reconsideration to be made on the next working day, Mr. Barnett was entitled to make his motion for reconsideration at any time during the session on Monday, March 24th, so the bill should have been recalled and kept in the possession of the House until disposition of the matter or adjournment. Such procedure is required under House Rule 48, which provides:

‘If a member gives notice that he intends to

move a reconsideration, the Clerk shall not report the measure to the Senate until the reconsideration is disposed of, or the time for moving same has expired.'

It should also be noted that the motion for reconsideration opens for debate the question to be reconsidered, which affects the rights of all members.

Notwithstanding House Rule 48, S. B. 105 was not called back from the Senate. At 2:45 p.m. of the 24th of March the Senate sent the bill to the Governor. About 4:45 of the same day the motion for reconsideration was made by Mr. Barnett. The Speaker ruled the motion out of order, expressing reasons hereinafter noted, and was sustained by vote of the House.

The Speaker's expressed reason, when ruling the motion for reconsideration out of order, was that S. B. 105 was no longer in the House and came under the rule that only bills of a revenue or appropriation nature would be considered after the 56th day, Monday the 24th, being the 57th day.

S. B. 105, which amends the UCC law to provide an experience rating formula, grants credits to employers against the 3% UCC tax and affects revenues to the Territorial Unemployment Compensation Fund to the extent of approximately a million dollars a year. The bill also shortens the waiting period for unemployed persons from two weeks to one week, which substantially affects the benefits that may be paid out of the Unemployment Compensation Fund. [81] Therefore, S. B. 105 is a bill of a revenue nature and eligible to be considered

and transmitted after the 56th day without suspending the rules.

I have reason to believe that legal authority in the Senate agrees that S. B. 105 is a revenue measure in character and apparently many members in the House think likewise as it admitted S. B. 117 (exempting certain fishermen from liability as contributors under the UCC law) on the grounds that S. B. 117 is a revenue measure. Since both S. B. 105 and S. B. 117 amend the UCC law to reduce contributions, they are both of the same character from a revenue standpoint.

The question to be considered is whether the transmittal of S. B. 105 by the Senate to the Governor about two hours before the House took final action on the motion for reconsideration constituted a valid transmittal of a bill duly passed by both houses. It is a matter of simple logic that no bill can be validly transmitted as an enactment of both houses prior to completion of all legislative steps pertaining thereto. Therefore, in all probability, S. B. 105 in its present condition would be productive of litigation unless sent back for valid transmittal to the Governor.

Very truly yours,

/s/ RALPH J. RIVERS,
Attorney General."

The Senate, however, took the position that the proceedings were in order.

There is a second reason why I desire not to sign this bill. It will be recalled that in my message to the Eighteenth Legislature, after reviewing the Territory's pressing needs and the great variety of untapped tax sources from which revenue could easily be secured, I pointed to the example of the Unemployment Compensation tax as an illustration of how wise forethought brought dividends. I pointed out that Unemployment Compensation was established by the Territorial Legislature ten years ago in connection with the Federal government Social Security program.

After ten years, the fund has risen to a point where the tax on employers could be substantially reduced. This was a sound proposal, and while this bill which puts it into effect is not by any means as good as it could be, the basic purpose which I outlined in my message has been fulfilled by it.

However, it is somewhat startling that we have passed up various forms of basic taxation which would bring in sorely needed revenue, and have adopted the one measure which would refund revenue. In exchange for this handsome refund which will probably amount to one million dollars for the [82] biennium and more in succeeding bienniums, the people of the Territory had a right to expect that industry and other hitherto untaxed activities would be willing to submit to some of the light taxation that was proposed, to take care of the Territory's pressing needs. This, however, has not been the case, and it is for the purpose of calling atten-

tion to this marked discrepancy that I am allowing Senate Bill No. 105 to become law without my signature.

Sincerely yours,

ERNEST GRUENING,

Governor of Alaska.

[83]

Chapter 74

In the Senate—By Committee on Judiciary and
Federal Relations

SENATE BILL No. 105

In the Legislature of the Territory of Alaska
Eighteenth Session

A Bill for an Act entitled: "An Act to amend Chapter 4 of the Extraordinary Session Laws of Alaska, 1937, as amended by Chapters 1 and 51, Session Laws of Alaska, 1939, as amended by Section 20, Chapter 40, Session Laws, 1941, by amending Subsection 7(c) providing for and establishing an Experience Rating for Territorial Employers under the Alaska Unemployment Compensation Law and amending Subsection 4(d) and to declare an effective date."

Be It Enacted by the Legislature of the Territory of Alaska:

Section 1. That Subsection 7(c) is hereby amended by striking out the present Section and substituting the following:

Subsection 7(c). "Experience Rating Credits."

Subsection 7(c) (1). Meaning of terms. As used in this Subsection.

(A) "Computation date" means January first (1st) of any year in which credits are being computed.

(B) "Effective date" means June thirtieth (30th) next following the computation date.

(C) "Credit year" means the four consecutive calendar quarters immediately following the effective date.

(D) "Cut-off date" means March fifteenth (15th) next following the computation date. [84]

(E) "Qualified employer" means any employer who was an employing unit and had employment for which remuneration was payable in each of the four consecutive calendar years immediately preceding the computation date and who filed any wage reports which may have been required thereon on or before the cut-off date, and has paid all contributions due on or before the effective date, provided however, that no such employer shall be deemed a qualified employer if he has had or has reported no employment for four or more consecutive calendar quarters in such four calendar years, and provided further, that when an employer or prospective employer has acquired all or substantially all the operating assets of another employing unit, the experience of both during such four calendar years shall be jointly considered for the purpose of determining and establishing the acquiring party's qualification for, and amount of, credit; and the transferring employing unit shall be divested

of its experience, and provided further that to the extent permitted by and in compliance with the requirements of Section 1602 of the Federal Internal Revenue Code, the Commission may by regulation provide for the fair and equitable allocation of experience with unemployment risk as measured by annual percentage declines in payrolls, to or among two or more employers whose operations have been transferred, joined, combined, merged or consolidated because of governmental regulations limiting a natural product, raw materials, supplies or manpower.

(F) "Payroll" means all remuneration payable for employment exclusive of remuneration in excess of three thousand dollars (\$3,000.) payable by any one employing unit to an individual during any one calendar year.

(G) "Surplus" means the lesser of:

(1) That amount by which the moneys in the Unemployment Compensation Trust Fund, as of the cut-off date, exceed four times the amount of contributions paid on or before the cut-off date with respect to the payrolls reported by all employers on or before said cut-off date for the preceding [85] calendar year, or

(2) An amount equal to sixty per cent (60%) of the contributions so paid for the preceding calendar year. No portion of the surplus shall be credited to any employer unless the amount of the surplus is at least ten per cent (10%) of the amount of the contributions paid on the payrolls reported by all em-

employers on or before the cut-off date for the preceding calendar year.

Subsection 7(c) (2). Establishment of credits. The amount of credit for each qualified employer shall be established in the following manner:

(A) Qualified employers shall be grouped into six credit classes, to be designated as classes 6, 5, 4, 3, 2 and 1, in accordance with the sum of the annual percentage payroll declines in regard to the three consecutive calendar years immediately preceding the computation date, each such percentage to be obtained by dividing any decline of the payroll of a qualified employer in any calendar year from the preceding calendar year by the amount of the payroll in such preceding year, each division being carried out to the fourth decimal place and the remaining fraction, if any, disregarded.

Each qualified employer shall be in the credit class which is listed below on the same horizontal line on which the sum of annual percentage payroll declines of such employer appear.

Sum of Annual Percentage Payroll Declines	Credit Class
Less than 10	6
10 or more but less than 30.....	5
30 or more but less than 50.....	4
50 or more but less than 70.....	3
70 or more but less than 80.....	2
80 or more	1

(B) A "class weight" shall be assigned to each credit class as follows:

Credit Class	Class Weight
6	6
5	5
4	4
3	3
2	2
1	0

(C) The "class product" shall be obtained by dividing the total of the payrolls for the calendar year immediately preceding the computation date for all qualified employers in the same class by the total of the payrolls of all qualified employers for such year, such division being carried out to the fourth decimal place, and multiplying the quotient by the class weight.

(D) The surplus to be credited to each class shall be the product obtained by dividing the class product for each class by the sum of the class products for all classes and multiplying the quotient by the surplus to be credited to all employers. No portion of the surplus shall be credited to credit class 1.

(E) The "class credit factor" shall be the quotient obtained by dividing that portion of the surplus assigned to any class of qualified employers by the sum of the payrolls of all employers in that class for the calendar year immediately preceding the computation date, such division being carried out to the fourth decimal place and the remaining fraction, if any, disregarded.

(F) That portion of the surplus which is to be credited to any qualified employer is the product obtained by multiplying his taxable payroll in the calendar year immediately preceding the computation date by the class credit factor of his class [87]

(G) As soon as practicable after the effective date each qualified employer shall be furnished a notice showing the amount of credit to which he is entitled, if any. The amount shown on the notice may be applied only against contributions which are payable by him on wages payable in the credit year and reported not later than the day prescribed by the Commission for payment of contributions on wages payable in the last quarter of such credit year, except that when an employer or prospective employer has acquired all or substantially all of the operating assets of another employer, any unused portion of the credit of the transferring employer shall be transferred to the acquiring party, provided that the transferring employer has submitted all reports and has paid all contributions and interest due to the date of such acquisition.

The first credit notices shall be effective with the credit year beginning July 1, 1947.

(H) Corrections and Appeals:

(1) Corrections or modifications of an employer's payroll shall not be taken into account for the purpose of an increase of his credit unless such corrections or modifications were established on or before the cut-off date.

(2) Corrections or modifications of an employer's payroll may be taken into account within three years after the cut-off date, for the purpose of a reduction of his credit.

(3) Within one year from the effective date the Commission may reconsider the credit allowed any employer whenever it finds that there has been an error in the computation thereof. When an increase is due, it shall issue to such employer a supplementary credit notice reflecting [88] the increase in the employer's credit; however, when a credit notice has been issued to an employer whose credit is reduced, such notice shall be recalled and a revised notice issued. If the credit shown by the incorrect notice has already been applied in payment of contributions in excess of the correct credit, the employer shall thereupon become liable for payment into the fund of an amount equal to the excess of the credit taken by him over the credit to which he is entitled and such amount shall be deemed and collected as contributions payable under this act.

(4) Increases or reductions of an employer's credit shall not affect the credits established or to be established for any other employer, and shall further not affect any other computation made under this Subsection.

(5) Any employer dissatisfied with the amount of credit shown on his credit notice may file a request for adjustment with the Commission within thirty (30) days of the mailing of such credit notice to an employer, showing wherein the amount of credit

may be in error. Should such request for adjustment be denied, the employer, within ten (10) days of the mailing of such notice of denial of adjustment, may file with the Appeal Tribunal a petition for hearing which shall be heard in the same manner as a petition for a denial of refund. The appellate procedure prescribed by this Act for further appeal shall apply to all denials of adjustment.

Section 2. That Chapter 4, Section 4(d), Extraordinary Session Laws of Alaska, 1937, as amended by Chapters 1 and 51, Session Laws of Alaska, 1939, as amended by Chapter 40, Session Laws of Alaska, 1941, as amended by Chapter 32, Section 3, Extraordinary Session Laws of 1945, be amended to read as follows: [89]

Subsection 4(d). He has been unemployed for a waiting period of one week. No work shall be counted as a week of unemployment for the purpose of this subsection:

(1) Unless it occurs within the benefit year which includes the week with respect to which he claims payment of benefits, provided that this requirement shall not interrupt the payment of benefits for consecutive weeks of unemployment.

(2) If benefits have been paid with respect thereto.

(3) Unless the individual was eligible for benefits in all respects, except for the requirements of

this subsection, of subsection (d) of section 3 and of subsection (e) of section 5.

Section 3. Effective Date. This Act shall become effective June 30, 1947.

Passed by the Senate March 13, 1947.

/s/ ANDREW NERLAND,
President of the Senate.

Attest:

/s/ JESTA M. MITCHELL,
Secretary of the Senate.

Passed by the House March 22, 1947.

/s/ O. S. GILL,
Speaker of the House.

Attest:

/s/ WM. L. PAUL,
Chief Clerk of the House.

Approved by the Governor....., 1947.

.....
Governor of Alaska.

[Endorsed]: Filed July 19, 1948.

[90]

MINUTES OF PROCEEDINGS

August 5, 1948

Permitting Admission of Associate Counsel for
Trial of Cause

Now at this time upon motion of J. Gerald Williams, of counsel for intervenors,

It Is Ordered that Herbert W. Haugland, a member of the Bar of the State of Washington, be, and he is hereby, admitted to practice before this Court for the hearing of cause No. A-4597, entitled Felton H. Griffin, plaintiff, versus R. E. Sheldon, et al, defendants, and United States Smelting, Refining and Mining Company et al, intervenors.

Entered Court Journal No. G 17, Page No. 138, Aug. 5, 1948. [91]

HEARING ON MOTION FOR NEW TRIAL

Now at this time hearing on motion for new trial in cause No. A-4597, entitled Felton H. Griffin, plaintiff, versus R. E. Sheldon, et al, defendants, and United States Smelting, Refining and Mining Company, et al, intervenors, came on regularly before the Court, the plaintiff not being present but represented by Stanley J. McCutcheon, of his counsel, the defendants not being present but represented by Ralph J. Rivers, Attorney General for Alaska, of their counsel, the intervenors not being present but represented by Herbert W. Haugland, W. C. Arnold and J. Gerald Williams, of their counsel. The following proceedings were had, to-wit:

At this time Ralph J. Rivers, of counsel for defendants, moves the Court for permission to re-open defendants case to permit the introduction of new evidence and upon stipulation by and between respective counsel the case is re-opened for introduction of new evidence by all parties.

A letter, dated July 29, 1948, signed by Frank A. Boyle, Auditor of Alaska, with a photostatic copy of a letter dated March 27, 1947, signed by Ernest Gruening, Governor of Alaska, addressed to the President of the Senate, Juneau, Alaska, was duly offered, marked and admitted as defendants exhibit "A".

Entered Court Journal No. G 17, Page No. 138, Aug. 5, 1948. [92]

An affidavit of Ernest Gruening, Governor of Alaska, dated July 8, 1948 in re letter of March 27, 1947 addressed to the Speaker of the House of Representatives, was duly offered, marked and admitted as defendants exhibit "B".

Argument to the Court was had by W. C. Arnold, for and in behalf of the intervenors.

At 10:35 o'clock a.m. Court continued cause to 10:45 o'clock a.m. [93]

Now came the respective counsel as heretofore and the hearing on motion for new trial in cause No. A-4597, entitled Felton H. Griffin, plaintiff, versus R. E. Sheldon, et al, defendants, and United States Smelting, Refining and Mining Company, et al, intervenors, was resumed.

Argument to the Court was resumed by W. C. Arnold, for and in behalf of the intervenors.

Argument to the Court was had by Herbert W. Haugland, for and in behalf of the intervenors.

Argument to the Court was had by J. Gerald Williams for and in behalf of the intervenors.

Argument to the Court was had by Stanley J. McCutcheon, for and in behalf of the plaintiff.

At this time Stanley J. McCutcheon, of counsel for plaintiff announces that plaintiff does not desire to offer any more evidence and rests; counsel for defendants and intervenors announce that they do not desire to offer any more evidence and rest.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, announced it would reserve its decision in this cause and defendants and intervenors allowed ten days within which to file briefs, and plaintiff allowed ten days additional time within which to file reply briefs.

Entered Court Journal No. G 17, Page No. 139, Aug. 5, 1948. [94]

September 10, 1948.

RENDERING ORAL DECISION

Now at this time the plaintiff not being present but represented by Stanley J. McCutcheon, of his counsel, the defendant not being present but represented by J. Gerald Williams, of their counsel, the intervenors not being present but represented by J. Gerald Williams, of their counsel and the court

having heretofore and on the 5th day of August, 1948, heard the arguments of respective counsel in cause No. A-4597, entitled Felton H. Griffin, plaintiff, versus R. E. Sheldon as Executive Director, Unemployment Compensation Commission of Alaska, et al, defendants, and having reserved its decision,

Whereupon the Court now renders oral decision finding for the plaintiff and against the defendants and denies motion for judgment for defendants and for new trial.

Entered Court Journal No. G 17, Page No. 172, Sept. 10, 1948. [95]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial on the 20th day of April, 1948, at the hour of 10:00 o'clock a.m. in the Courtroom of the above-entitled Court at Anchorage, Alaska, on plaintiff's complaint, praying judgment as follows:

1. That defendants and each of them be enjoined and restrained from issuing credit notices or otherwise establishing credit for employers against sums due and owing or to become due and owing under the Alaska Unemployment Compensation Law.

2. That the Court find and declare Chapter 74

of the Session Laws of Alaska for 1947 entitled, "An Act to Amend Chapter 4 of the Extraordinary Session Laws of Alaska, 1937, as amended by Chapter 1 and 51, Session Laws of Alaska, 1939, as amended by Section 20, Chapter 40, Session Laws, 1941, by amending Subsection 7(c) providing for and establishing an Experience Rating for Territorial Employers under [96] the Alaska Unemployment Compensation Law and amending subsection 4(d) and to declare an effective date", null and void and of no force and effect.

Plaintiff having been represented by his Counsel, Stanley J. McCutcheon, Esq., and Buell A. Nesbett, Esq., of the firm of McCutcheon & Nesbett of Anchorage, Alaska, the defendants being represented by J. Gerald Williams, Esq., as associate Counsel appearing for Ralph Rivers, Esq., the Honorable Attorney General of Alaska, and the Intervenor being represented by J. Gerald Williams, H. L. Faulkner, Esq., of the firm of Faulkner & Banfield of Juneau, Alaska, and Edward F. Medley, Esq., of the firm of Medley & Haugland of Seattle, Washington.

These parties having announced readiness for trial and opening statements having been made, plaintiff called as his first and only witness, the Honorable Lew M. Williams, Secretary of Alaska. Plaintiff rested and defendants and intervenors having called no witnesses, introduced several exhibits and rested.

The Court having heard the concluding arguments of Counsel for all parties, took the matter

under advisement and subsequently rendered an opinion on the 28th day of June, 1948.

The defendants and intervenors having seasonably moved the Court thereafter for a reconsideration and the matter then coming before the Court regularly on its calendar on the 5th day of August, 1948, and at said time the plaintiff was represented before said Court by his attorneys, Stanley J. McCutcheon, Esq., and Buell A. Nesbett, Esq.; the defendants being represented by Ralph Rivers, Esq., Attorney General of Alaska, and the intervenors being represented by J. Gerald Williams, Esq., of Anchorage, Alaska, and W. C. Arnold, Esq., and H. W. Haugland, Esq. of Counsel of record, both of Seattle, Washington, and the parties having announced themselves as ready for trial, the Court thereupon, upon motion of the defendants, after consideration, reopened the case for the introduction of further evidence by all parties.

Thereupon the defendants and intervenors introduced further documentary evidence and stipulations and rested and the plaintiff rested. At the conclusion of said hearing on August 5, 1948, the Court, after [97] hearing the arguments of Counsel, took said matter under advisement and on September 10, 1948, having considered the proof and evidence in said cause, the arguments and briefs of Counsel, rendered its oral opinion to the effect that it denied the motion of the defendants and intervenors for judgment notwithstanding its Memorandum Opinion, and for new trial. and that it held in favor of the plaintiff in accordance with

its written opinion signed June 28, 1948, as the law in this case, and said Court does now in accordance therewith, make and enter the following:

FINDINGS OF FACT

1. That the plaintiff, Felton H. Griffin, is a citizen and taxpayer of the Territory of Alaska.

2. That the defendant R. E. Sheldon, is now and at all times mentioned has been the executive director of the Unemployment Compensation Commission of Alaska, and as such Executive Director is charged with the duties of administering the Alaska Unemployment Compensation Law; that he is a citizen of the Territory of Alaska. residing at Juneau, Alaska; that defendants Ernest F. Jensen, Anthony Zorich and George Vaara are each resident citizens of the Territory of Alaska, and these persons constitute the Unemployment Compensation Commission of Alaska.

3. That each of the corporate intervenors are corporations regularly qualified to do business within the Territory of Alaska and each of the individual intervenors are citizens and residents of Alaska and all of said intervenors are employers affected by the Unemployment Compensation Laws and each has a substantial interest in the matter in litigation.

4. That the Thirteenth Legislature for the Territory of Alaska in extraordinary session assembled during the year 1937, passed an Act entitled, "An Act to provide for Unemployment Compensation; to provide for the Establishment of Public Em-

ployment offices; to provide funds therefor; to create a Commission to administer the act; and to define its duties; to provide for its appointment; to provide for cooperation with the United States of America in the Administration of the Act; to provide penalties for violations; to provide for an appropriation to carry the [98] act into effect; and to declare an emergency." Said act provided in Section 1 as follows: "This Act shall be known and may be cited as the Alaska Unemployment Compensation Law."

5. That the Eighteenth Legislature for the Territory of Alaska in regular session assembled during the year 1947, purported to have passed an Act, amending the Alaska Unemployment Compensation Law; that the title of said purported amendment was as follows: "An Act to amend Chapter 4 of the Extraordinary Session Laws of Alaska, 1937, as amended by Chapter 1 and Chapter 51, Session Laws of Alaska, 1939, as amended by Section 20, Chapter 40, Session Laws, 1941, by amending Subsection 7(c) providing for and establishing an Experience Rating for Territorial Employers under the Alaska Unemployment Compensation Law and amending Subsection 4(d) and to declare an effective date."

6. That the said purported amendment provided in Subsection 7(c)(2), et seq., thereof for the establishment of a system of "Credit" for so-called "Qualified Employers", which said "Credit" under an involved and complicated mathematical formula set out in the said amendment, could result

in a "Surplus", so-called, in favor of employers within so-called "Credit Classes", resulting in "Credit Notices" being given to employers qualified under the said amendment, said "Credit Notices" to be applied to reduce future Unemployment Compensation payments made by the employers qualifying thereunder.

7. That the effect of the so-called "Experience Rating" amendment to the Alaska Unemployment Compensation Act would be to reduce payments to the Alaska Unemployment Compensation fund for the fiscal year commencing July 1, 1947, by employers qualifying under said purported amendment.

8. That the Unemployment Compensation Act of Alaska together with amendments and purported amendments thereto bears an intimate relation to the economic well being of the Territory of Alaska.

9. That the said Experience Rating amendment, known as Senate Bill No. 105, was introduced in the Senate of the Alaska Territorial Legislature at the 1947 Session of that body, was considered and passed in due course by the Senate. Said Bill then came into the House of Representatives on the 47th day of Session, was read the first time and referred to appropriate committee. On the 50th day of the Session, the committee reported the bill back [99] to the House, recommending enactment. On the 55th day of the Session, the measure was brought up in the House of Representatives for consideration and read the second time, whereupon numerous amendments to the bill were

offered and voted upon. At the conclusion of all amendments in said House Journal, is found the following: "It was moved by Mrs. Engstrom, seconded by Mr. D. Anderson, that the rules be suspended as to Senate Bill No. 105, that it be considered re-engrossed, advanced to third reading, read by number only and placed in final passage." A vote was thereupon taken and the rules suspended and the bill passed by a vote of 16 yeas and 8 nays.

The Journal further recites that, "Senate Bill No. 105 was read the third time by number only." Later in the same day, as shown by the Journal, one of the members, Mr. Barnett, voting in favor of the bill, "gave notice of his intent to move for a reconsideration of his vote" thereon. It was thereupon moved by another member that the rules be suspended and that the bill be reconsidered immediately, but this motion failed of passage by a vote of 13 yeas to 10 nays.

That on the 57th day of said session is found a Journal entry, indicating that a message from the Senate was read, transmitting the enrolled copy of Senate Bill No. 105 for the signature of the speaker and the chief clerk of the house. It is further found that the Speaker announced he had signed the enrolled copy of Senate Bill No. 105 and ordered the same returned to the Senate. It is found that later in the day, Mr. Barnett, who had theretofore given notice of his intent to ask for reconsideration of the bill, moved that it be reconsidered at that time. The Speaker ruled the motion

out of order. An appeal was taken from the ruling of the Chair. The ruling was put to the House and the decision of the Chair was sustained by a vote of 14 yeas to 8 nays. It is found that on the same day, the 57th day of the Session, the Senate ordered the bill to be transmitted to the Governor. That on the 59th day of the said Session in the afternoon a message from the Governor to the President of the Senate was read to the Senate. [100] That the Governor returned the bill to the Senate. That the Senate voted to return the bill to the Governor immediately thereafter.

That the House Journal of March 27, 1947, the 60th and last day of the Session, shows the reading of a message from the Governor, which is dated that day, wherein the Governor states: "I have transmitted Senate Bill No. 105 to the Office of the Secretary of Alaska for permanent filing. Senate Bill No. 105 becomes law without my signature."

That an unsigned carbon copy of said letter of the Governor of Alaska was at the same time transmitted by the Governor with said original Senate Bill 105 to the Secretary of Alaska and was received by the Secretary of Alaska on March 27, 1947 and was the only letter of transmittal accompanying said Bill; that the said carbon copy of the said letter of the Governor of Alaska was attached to said Bill and was filed as a part of the records of permanent filing of said Bill in the office of the Secretary of Alaska; that the said office of the Secretary of Alaska is the repository for per-

manent filing of enacted bills of the Territory of Alaska; that the Secretary of Alaska accepted the said letter of transmittal and thereupon published and printed said Senate Bill 105 as a part of the Session Laws of the Territory of Alaska and appended to the bound volume his certificate of official authentication.

That the original letter, herein referred to, of the said Governor of Alaska was regularly transmitted by the President of the Senate of Alaska to the Auditor of the Territory of Alaska and that the said original letter reposes in the custody of the said Auditor of Alaska and is part of the permanent files of said office.

That by reason of the fact that the letter of transmittal of Senate Bill 105 from the Governor of Alaska to the Secretary of Alaska [101] for permanent filing is an unsigned carbon copy of said original letter of the Governor dated March 27, 1947, it became necessary for the Trial Court in this case to refer to the Legislative journals, together with other in addition to proof that to be found in the office of the Secretary of Alaska in order to determine the validity of said Senate Bill 105.

10. That on April 1, 1948 counsel of record for all of the parties to the action entered into and signed a written stipulation, filed in Court on April 5, 1948, which stipulation in part reads as follows:

“It Is Hereby Stipulated and Agreed By and Between Plaintiff, Defendants and Intervenor through their respective counsel that upon the trial

of the above entitled cause there may be introduced in evidence by either the Plaintiff, the Defendants or the Intervenor, the bound printed volumes of the House and Senate Journals of the Alaska Legislature for the year 1947, Eighteenth Session, for the convenience of the Court in referring to the pertinent parts of the Journals involved in the above entitled cause, and that those printed copies of the Journals may be received as authentic and true copies of the proceedings in the Eighteenth Alaska Legislature.”

11. That the Governor of Alaska refused to sign said Experience Rating Amendment and has not signed the same.

12. That the Eighteenth Territorial Legislature for the Territory of Alaska adjourned sine die on the 27th day of March, 1947.

And from the foregoing findings of fact, the Court does now make and enter the following

CONCLUSIONS OF LAW

1. That the “subject” of the legislation known as Senate Bill No. 105 is adequately expressed in the title of the Act.

2. That the Governor of Alaska did not veto said Senate Bill No. 105.

3. That the motion to reconsider Senate Bill No. 105 in the House of Representatives did not invalidate said Act.

4. That Chapter 74 of the Session Laws of Alaska, 1947, known as Senate Bill No. 105 did not become law because of failure of the House of

Representatives to comply with the Organic Act of Alaska, requiring three separate readings. [102]

5. That a permanent injunction should be entered herein, restraining the defendants and each of them from issuing credit notices or otherwise establishing credits for employers against the sums due or to become due under the Alaska Unemployment Compensation Law as provided by Chapter 74 of the Session Laws of Alaska, 1947, as prayed for in plaintiff's complaint.

Done in open Court at Anchorage, Alaska, this 7th day of October, 1948.

ANTHONY DIMOND,

District Judge.

Presented by:

S. McCUTCHEON,
McCUTCHEON & NESBETT,
Attorneys for Plaintiff.

Copy received:

RALPH RIVERS,
J. GERALD WILLIAMS.
Attorneys for Defendants.

By H. W. HAUGLAND.

Copy received:

W. C. ARNOLD,
FAULKNER, BANFIELD &
BOOCHEVER,
MEDLEY & HAUGLAND,
J. GERALD WILLIAMS,
Attorneys for Intervenors.
By H. W. HAUGLAND.

In the District Court for the Territory of Alaska,
Third Division

No. A-4597 Civil

FELTON H. GRIFFIN,

Plaintiff,

vs.

R. E. SHELDON as Executive Director, Unemployment Compensation Commission of Alaska: ERNEST F. JESSEN, ANTHONY ZORICH, and GEORGE VAARA as the Unemployment Compensation Commission of Alaska,

Defendants,

UNITED STATES SMELTING, REFINING & MINING COMPANY, a corporation; ALASKA LAUNDRY, INC., a corporation; PACIFIC AMERICAN FISHERIES, INC., a corporation; HEALY RIVER COAL CORPORATION, a corporation; JUNEAU SPRUCE CORPORATION, a corporation; KETCHIKAN SPRUCE MILLS, a corporation; WESTERN FISHERIES COMPANY, a corporation; WELLS ALASKA MOTORS, a copartnership; and JOE COBLE, d/b/a THE PIONEER CAB COMPANY, and all others similarly situated,

Intervenors.

DECREE

Be It Remembered, that on the 20th day of April, 1948, at the hour of 10 o'clock a.m. the above entitled cause came on regularly for hearing

on the merits on the plaintiff's petition for an injunction before the Honorable Anthony J. Dimond, Judge of the above entitled Court. All parties were represented by counsel and announced readiness for trial. Thereafter, the parties presented to the Court testimony and stipulations after which the Court heard arguments by the attorneys for the respective parties. Thereafter, the Court, having filed a Memorandum Opinion, and motions for reconsideration having been seasonably filed by the defendants and intervenors, the matter having come regularly before Court on its calendar on the 5th day of August, 1948, at the hour of 10 o'clock a.m. and all parties being again represented in Court by their counsel of record and the Court having regularly re-opened the case for the [104] introduction of further testimony and testimony having been introduced after which the Court heard arguments by the attorneys for the respective parties and thereafter the said Court on September 10, 1948, at the hour of 2 o'clock p.m. having announced by oral opinion its decision re-affirming the written opinion of June 28, 1948, and the Court being fully advised in the premises, having made, filed and entered herein its Findings of Fact and Conclusions of Law, now therefore by virtue of the law and the premises,

It Is Hereby Ordered, Adjudged and Decreed that Chapter 74, Session Laws of Alaska, 1947, be and the same is hereby declared to be null and void and of no force and effect whatsoever, and

It Is Further Ordered, Adjudged and Decreed

that R. E. Sheldon as Executive Director and Ernest F. Jessen, Anthony Zorich and George Vaara, as the Unemployment Compensation Commission of Alaska, be and they are hereby restrained from giving or granting any credit or credits of any kind or nature to any employer of the Territory of Alaska, including the Intervenor, United States Smelting, Refining and Mining Company, a corporation; Alaska Laundry, Inc., a corporation; Pacific American Fisheries, Inc., a corporation; Healy River Coal Corporation, a corporation; Juneau Spruce Corporation, a corporation; Ketchikan Spruce Mills, a corporation; Western Fisheries Company, a corporation; Wells Alaska Motors, a co-partnership; and Joe Coble, d/b/a The Pioneer Cab Company, and all others similarly situated and each of them, as provided in the provisions of Chapter 74, Session Laws of Alaska, 1947, or otherwise proceeding in any manner thereunder.

To all of the Decree and Order the defendants and intervenors except and their exceptions are hereby allowed.

Done in open Court at Anchorage, Alaska, this 7th [105] day of October, 1948.

/s/ ANTHONY J. DIMOND,
District Judge.

Presented by:

STANLEY McCUTCHEON,
McCUTCHEON & NESBETT,
Attorneys for Plaintiff.

Approved as to form:

RALPH RIVERS,
J. GERALD WILLIAMS,
By H. W. HAUGLAND,
Attorneys for Defendants.

Approved as to form:

W. C. ARNOLD,
FAULKNER, BANFIELD & BOOCHEVER.
MEDLEY & HAUGLAND,
J. GERALD WILLIAMS,
By H. W. HAUGLAND,
Attorneys for Intervenors.

Entered Court Journal No. G-17, Page No. 227,
Oct. 7, 1948.

[Endorsed]: Filed Oct. 7, 1948.

[106]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT
OR FOR NEW TRIAL

This matter coming regularly before the court for entry of order and the court having heretofore on September 10, 1948 in open court announced its ruling denying defendants and intervenors motion for judgment or in the alternative for new trial and the parties having approved the form of this order and the court being fully advised does here and now

Order, Adjudge and Decree that the motion of

the defendants and intervenors for judgment or in the alternative for new trial be and the same is hereby denied to which order the defendants and the intervenors except and their exception is hereby allowed.

Done in open Court at Anchorage, Alaska, this 7th day of October, 1948.

ANTHONY DIMOND,

District Judge.

[107]

Approved as to form:

BUELL A. NESBETT,
McCUTCHEON & NESBETT,
Attorneys for Plaintiff.

RALPH RIVERS,
J. GERALD WILLIAMS,

By H. W. HAUGLAND,
Attorneys for Defendants.

W. C. ARNOLD,
FAULKNER, BANFIELD & BOOCHEVER,
MEDLEY & HAUGLAND,
J. GERALD WILLIAMS,

By H. W. HAUGLAND,
Attorneys for Intervenors.

Entered Court Journal No. G-17. Page No. 228,
Oct. 17, 1948.

[Endorsed]: Filed Oct. 7, 1948.

[108]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The above named defendants, R. E. Sheldon as Executive Director, Unemployment Compensation Commission of Alaska, Ernest F. Jessen, Anthony Zorich, and George Vaara as the Unemployment Compensation Commission of Alaska, and each of them, and the intervenors, United States Smelting, Refining and Mining Company, a corporation, Alaska Laundry, Inc., a corporation, Pacific American Fisheries, Inc., a corporation, Healy River Coal Corporation, a corporation, Juneau Spruce Corporation, a corporation; Western Fisheries Company, a corporation; Wells Alaska Motors, a co-partnership, and Joe Coble, d/b/a The Pioneer Cab Company, and all others similarly situated, and each of them, considering themselves aggrieved by the Order, Judgment and Decree made and entered in the above entitled action on the 7th day of October, 1948, in favor of the above [109] named plaintiff and against the said defendants wherein it was ordered and adjudged that the issues joined in said cause are found in favor of the plaintiff and against the defendants and the intervenors and an injunction was ordered enjoining the defendants above named from issuing credit or credits of any kind or nature to any employer of the Territory of Alaska, including the intervenors and each of them, as provided in Chapter 74 of the Session Laws of Alaska, 1947, do hereby appeal from said Order, Judgment and Decree, and the

whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified and set forth in the Assignment of Errors which is filed herewith, and the defendants and intervenors pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which the said Order, Judgment and Decree were made, duly authenticated by the Clerk of this Court, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California;

And the defendants above named, and each of them, respectfully represent that this suit has been brought against them in their official capacity as the Unemployment Compensation Commission of Alaska to restrain them from enforcing a law adopted by the Legislature of the Territory of Alaska and that this appeal is directed by the Attorney General of Alaska and that hence no appeal bond or other bond shall be required in this cause.

Dated at Anchorage, Alaska, this 7th day of October, 1948.

RALPH RIVERS,
Attorney General of Alaska.

RALPH RIVERS,
J. GERALD WILLIAMS,

By H. W. HAUGLAND,
Attorneys for Defendants.

W. C. ARNOLD,
FAULKNER, BANFIELD &
BOOCHEVER,
MEDLEY & HAUGLAND,
J. GERALD WILLIAMS,
By H. W. HAUGLAND,
Attorneys for Intervenors.

[Endorsed]: Filed Oct. 7, 1948.

[110]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Come now the above named defendants and intervenors and allege that the Findings, Conclusions and Decree of the above entitled court entered in the above entitled cause on the 7th day of October, 1948, are erroneous and unjust to them, and file with this petition for allowance of appeal the following assignment of errors on which they will rely, to-wit:

I.

The Court erred in finding that Felton H. Griffin, plaintiff, is a citizen and taxpayer of the Territory of Alaska.

II.

That the Court committed error in examining and considering the Journal of the House of Representatives of the Territory of Alaska for the purpose of determining the validity of Senate Bill 105 [111] which was adopted by the said Legislature and in failing to give judicial notice and

weight to the said Bill after it had become duly enrolled, printed and published as Chapter 74 of the Session Laws of Alaska, 1947.

III.

That the Court committed error in determining that it became necessary to refer to the Legislative Journals by reason of the fact that a carbon copy of the letter from the Governor of Alaska accompanied Senate Bill 105 when it was transmitted to the Secretary of Alaska for permanent filing.

IV.

That the Court erred in entering a Conclusion of Law that the plaintiff as a citizen and taxpayer of Alaska is entitled to bring and maintain this suit.

V.

That the Court erred in its Conclusions of Law that Chapter 74 of the Session Laws of Alaska, 1947, was invalid because it failed to have three readings in the House of Representatives.

VI.

That the Court erred in its Conclusion that a decree should be entered in favor of the plaintiff and that an injunction should be granted.

VII.

That the Court erred in giving and entering a Decree in favor of the plaintiff and against the defendants permanently enjoining the defendants as the Unemployment Compensation Commission and Director thereof from granting or giving credits to the intervenors and all other employers of Alaska as provided in Chapter 74 of the Session

Laws of Alaska, 1947, and that the said Decree should have been for dismissal.

VIII.

That the Court erred in entering an Order denying the defendants and intervenors Motion for Judgment or in the Alternative for a new trial.

Wherefore, defendants and intervenors pray that said Decree, the Findings and Conclusions in support thereof, be set aside and the injunction dismissed in furtherance of justice and in accordance with law.

Dated at Anchorage, Alaska, this 7th day of October, 1948.

RALPH RIVERS,

J. GERALD WILLIAMS,

By H. W. HAUGLAND,

Attorneys for Defendants.

W. C. ARNOLD,

FAULKNER, BANFIELD &

BOOCHEVER,

MEDLEY & HAUGLAND,

J. GERALD WILLIAMS,

By H. W. HAUGLAND,

Attorneys for Intervenors.

[Endorsed]: Filed Oct. 7, 1948.

[113]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

This matter coming regularly before the Court on this 7th day of October, 1948, to be heard upon the petition of the defendants and intervenors above named for the allowance of an appeal in behalf of said defendants and intervenors from the Findings of Fact, Conclusions of Law and Order and Decree entered in said cause on the 7th day of October, 1948, and whereas the defendants and each of them are the authorized agents of the Government of the Territory of Alaska and no cost bond is required of the said defendants,

Now, therefore, it is Ordered that the appeal of the said defendants and the intervenors from the Order, Judgment and Decree entered herein on October 7th, 1948, be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit and that a certified copy of the transcript of record, proceedings, [114] orders, and all other proceedings in said matter on which said Order, Judgment and Decree appealed from is based, be transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before forty (40) days from this date to be heard at San Francisco, California, or such other place within the Ninth Circuit as may be designated.

It is further Ordered that the defendants herein are not required to file a bond and that the in-

Territory of Alaska, Division Number Three, in the above entitled matter is hereby acknowledged and accepted:

Petition for Allowance of Appeal.

Assignment of Errors.

Order Allowing Appeal and Granting Superse-
deas.

Citation on adverse party.

Copy of Cost Bond.

Dated at Anchorage, Alaska, this 7th day of
October, 1948.

S. McCUTCHEON,
Counsel for Plaintiff and Appellee.

[Endorsed]: Filed Oct. 8, 1948. [118]

United States Fidelity and Guaranty Company
Baltimore, Maryland

No. A-4597

\$250.00

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, United States Smelting, Refining and Mining Company, a corporation; Alaska Laundry, Inc., a corporation; Pacific American Fisheries, Inc., a corporation; Healy River Coal Corporation, a corporation; Juneau Spruce Corporation, a corporation; Ketchikan Spruce Mills, a corporation; Western Fisheries Company, a corporation;

Wells Alaska Motors, a co-partnership; and Joe Coble, d/b/a The Pioneer Cab Company, and all others similarly situated, the Intervenor above named, as Principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact surety business in the Territory of Alaska, Baltimore, Maryland, as Surety, are held and firmly bound unto Felton H. Griffin, plaintiff, in the full sum of Two Hundred Fifty and No 100 Dollars (\$250.00), to be paid to the said Felton H. Griffin, plaintiff, his heirs, executors, administrators, successors or assigns, to which payment well and truly be made, we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally by these presents. [119]

Sealed with our seals and dated this 6th day of October, 1948.

Whereas, on the 6th day of October, 1948, in a suit pending in the District Court for the Territory of Alaska, Third Division, between Felton H. Griffin, plaintiff, and the defendants above named, and the intervenors above named, a judgment was rendered in favor of the said Felton H. Griffin, plaintiff, and against the said defendants and intervenors, and the said named defendants and intervenors have petitioned for and been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and a citation has been issued and directed to the said Felton H. Griffin, citing him to appear in said Court at San Francisco, California, thirty (30) days from and after the date of said citation.

Now, Therefore, the Condition of the Above Obligation is Such, that if the said Defendants and Intervenor above named shall prosecute their appeal to effect an answer all costs, if the appeal is dismissed or by judgment affirmed, or all such costs as the appellate court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, a corporation; ALASKA LAUNDRY, INC., a corporation; PACIFIC AMERICAN FISHERIES, INC., a corporation; HEALY RIVER COAL CORPORATION, a corporation; JUNEAU SPRUCE CORPORATION, a corporation; KETCHIKAN SPRUCE MILLS, a corporation; WESTERN FISHERIES COMPANY, a corporation; WELLS ALASKA MOTORS, a co-partnership; and JOE COBLE d/b/a The Pioneer Cab Company, and all others similarly situated, the Intervenor,

By H. W. HAUGLAND,

One of Attorneys for Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY SURETY,

By GRACE M. McCONNELL,
Attorney-in-Fact.

(Corporate Seal.)

Approved October 7, 1948.

/s/ ANTHONY J. DIMOND,
District Judge.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

This cause coming on for hearing in equity before the Honorable Anthony J. Dimond, Judge of the above entitled court, at a regular session of the court held at Anchorage, Alaska, in the Third Judicial Division of said Territory, on the 20th day of April, 1948; the plaintiff was represented by his attorneys, McCutcheon and Nesbett and the defendants were represented by J. Gerald Williams as associate counsel for Ralph J. Rivers, Attorney General of Alaska and the intervenors were represented by their attorneys of record, H. L. Faulkner of Juneau, Alaska, and Edward F. Medley, of Seattle, Washington.

Whereupon, the parties respectively offered and introduced the following evidence and exhibits of evidence, and the following rulings of the Court were entered, all as follows, to-wit: [121]

TRANSCRIPT OF PROCEEDINGS

On Tuesday, April 20, 1948, the above-entitled matter came on regularly for trial in open court before the Honorable Anthony J. Dimond, United States District Judge. The following comprises certain excerpts of the proceedings had at that time.

McCutcheon and Nesbett of Anchorage, Alaska, appeared as attorneys for the plaintiff.

Mr. J. Gerald Williams of Anchorage, Alaska, appeared as associate counsel for the defendants, appearing for Honorable Ralph Rivers, Attorney General of Alaska.

Mr. H. L. Faulkner of Juneau, Alaska, and Mr. Edward F. Medley, of Seattle, Washington, appeared as attorneys for the intervenors.

Court: This is the day set for trial of the case of Felton H. Griffin, Plaintiff, vs. R. E. Sheldon and another. Is the plaintiff ready for trial? [122]

Mr. McCutcheon: The plaintiffs are ready.

Court: Are the defendants ready?

Mr. Williams: The defendants are ready, your Honor.

Court: I have read most of the papers that appear in the file including the amended complaint and several answers, motions for leave to intervene, also a memorandum brief of the Attorney General, Mr. Rivers; also the stipulation with respect to proof. Is it contemplated that any oral testimony will be offered on behalf of the plaintiff?

Mr. McCutcheon: The plaintiff will put only one witness on the stand for just one moment, your Honor.

Court: Do the defendants anticipate they will wish to offer oral testimony?

Mr. Faulkner: Your Honor, I think not. We have stipulations there. We may use the Journals in their entirety in preference to picking out separate pages. There is just one other thing we would like to present now: We have alleged the intervenors are employers of labor and that has been denied, I think perhaps inadvertently, by the plaintiff. If the plaintiff admits that we would have no testimony. If the plaintiff denies it, of course, we would have to prove it by Mr. Sheldon or some other witness.

Mr. McCutcheon: We will admit it, your Honor.
Let the record show.

Court: Is that admission satisfactory? [123]

Mr. Faulkner: Yes.

Opening statement to the Court was then had by Mr. Stanley J. McCutcheon for and in behalf of the plaintiff.

Opening statement to the Court was had by Mr. H. L. Faulkner for and in behalf of the defendants.

Court: Very well. If there is any testimony to be adduced counsel may proceed.

Mr. McCutcheon: Call the Honorable Lew Williams.

HONORABLE LEW M. WILLIAMS

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you kindly state your name, sir?

A. Lew M. Williams.

Q. And what is your official capacity?

A. Secretary of Alaska.

Q. Are you not now Acting Governor?

A. That is correct.

Q. In your capacity as Secretary of Alaska, are you custodian of the official bills passed by the Territorial Legislature? A. That is correct.

Q. Do you have in your possession what is known as Senate Bill 105, purportedly passed in the last session of the Legislature? [124.]

A. Yes, I have a certified copy of it, Mr. McCutcheon.

Q. Is this a copy certified to by you?

A. That is correct.

Q. Does counsel have any objection? (Handing document to Mr. Faulkner.)

Mr. McCutcheon: We offer the certified copy in evidence.

Mr. Faulkner: Yes—we have no objection to this, your Honor. We haven't compared it, but I am sure that Mr. Williams has it correct. We have a certified copy also here.

Court: It may be admitted without objection and marked Plaintiff's Exhibit No. 1.

(Plaintiff's Exhibit No. 1 admitted in evidence.)

[Clerk's Note: This exhibit has already been reproduced as part of Exhibit "C", page 92 and for economy is not here reproduced.]

Mr. McCutcheon: Your witness.

Mr. Faulkner: We have no questions.

Court: That is all, Mr. Williams. Is there any other testimony to be offered?

Mr. McCutcheon: That is all.

Court: Have the defendants any oral testimony to propose?

Mr. Faulkner: No sir.

Mr. Medley: No, your Honor.

Court: Very well. Counsel for plaintiff may proceed to argument.

Mr. Faulkner: Wait just a moment. Pardon me, your Honor, there is one document here we would

like to file. Your Honor, there is here a certified copy from Mr. Williams of the Governor's [125] message to the Legislature in which he says the bill is permitted to become law without his signature. Now, that is in the Journal, but I brought this certified copy of it. Have you any objection to it?

Mr. McCutcheon: No objection.

Mr. Faulkner: It may simplify matters rather than have you pick it up in the Journal.

Court: Is there objection?

Mr. McCutcheon: No objection.

Mr. Faulkner: We offer this as Intervenor's Exhibit.

Court: For all the intervenors, Mr. Faulkner?

Mr. Faulkner: Yes sir, for all. We represent them all—Mr. Medley and I do.

Court: Very well. It may be admitted as Intervenor's Exhibit A.

(Intervenor's Exhibit A admitted in evidence.)

[Clerk's Note: This exhibit has already been reproduced as Exhibit "C" on page 86 and for economy is not here reproduced.]

Argument was then had to the Court by Mr. Buell A. Nesbett for and in behalf of the Plaintiff.

Argument was had to the Court by Mr. Stanley J. McCutcheon for and in behalf of the plaintiff.

Argument was had to the Court by Mr. H. L. Faulkner for and in behalf of the intervenors.

Argument was had to the Court by Mr. Edward Medley for and in behalf of the intervenors. [126]

Argument to the Court was had by Mr. J. Gerald Williams for and in behalf of the defendants, as associate counsel and appearing for Honorable Ralph Rivers, Attorney General of Alaska.

Closing argument was then had to the Court for and in behalf of the plaintiff by Mr. Nesbett and Mr. McCutcheon.

Court: Decision will necessarily be reserved, but I suspect that whatever the decision is the case will be brought before an appellate court for review and, therefore, it is desirable to have the record in the best possible order.

Now I understand from the stipulation of counsel that the House and Senate Journals are to be considered by the Court as admitted in evidence. Am I right in that, or are they just to be considered without being in evidence?

Mr. Faulkner: No, I think our stipulation was they may be admitted in evidence, your Honor. We did that to avoid getting certified copies.

Court: Well then, I presume these copies of the House and Senate Journals will be marked as part of the court record.

Mr. Faulkner: Yes, I think so.

Court: And the Robert's Rules of Order, since they are referred to in the House Rules?

Mr. Faulkner: Yes, sir.

Court: Then I presume there would be no objection to having in evidence this copy of Robert's Rules of Order also? [127]

Mr. McCutcheon: No.

Court: It appears to be a printed volume of

the Rules and it is a well known publication. All three of these books, then, may be marked as admitted in evidence as exhibits in the case and they can be numbered Exhibits 101, 102, 103—as the Court's exhibits.

(Court's Exhibits 101, 102, and 103 admitted in evidence.)

There was some further discussion regarding the filing of briefs, and the hearing was closed.

United States of America,
Territory of Alaska—ss:

I, Ruth Haley, Official Court Reporter of the above entitled court, hereby certify:

That the foregoing is a true and correct transcript of the proceedings indicated in the above entitled matter taken by me in shorthand in open court at Anchorage, Alaska, on April 20, 1948, and thereafter transcribed by me.

..... [128]

TRANSCRIPT OF PROCEEDINGS

On Thursday, August 5, 1948, the above-entitled matter came on for hearing on motion for new trial before the Honorable Anthony J. Dimond, United States District Judge.

Mr. Stanley J. McCutcheon of McCutcheon & Nesbitt, Anchorage, Alaska, appeared as attorney for the plaintiff.

Honorable Ralph J. Rivers, Attorney General of Alaska, Juneau, Alaska, appeared as attorney for the defendants.

Messrs. Herbert W. Haugland and W. C. Arnold of Seattle, Washington, and J. Gerald Williams of Anchorage, Alaska, appeared as attorneys for the intervenors.

At that time the following proceedings were had:

Court: This is the day set for hearing a motion, or [129] motions, in the case of Griffin against Sheldon, No. A-4597. Counsel may proceed.

Mr. Rivers: May it please the Court, as the Court knows I was in Washington when this matter was heard before. Now that I have come up here personally to represent the Board, I wanted to submit to the Court my view as to the scope of the motion which is now before the Court.

I brought with me a couple of documentary items that I wish to introduce in evidence. As I say, I have not been conversant with the procedural details up until this point. On looking at this motion I find it is a motion for judgment for the defendants, and there is also some language in there that says "or for a new trial." Now, I can assure the Court I am not asking for a new trial on behalf of the defendants, but since there have been no findings and no decree entered in this case, and this is a motion for judgment, I think that perhaps the Court could consider it open for the submission of a little supplementary evidence as well as for hearing some additional argument on the case.

I have talked to counsel, attorney for the plaintiff, and counsel says that he will not object to the Court regarding this matter now as open for the submission of a couple of additional items of evi-

dence. We would like to submit those items before we present the additional arguments, and I ask the Court to regard this proceedings as a proceedings which [130] does re-open the matter for the submission of those extra items of evidence.

Mr. McCutcheon: Well, if the Court please, we resist re-opening the matter, but in the event the Court holds that the case is open to further evidence there are certain items which we would be willing to stipulate go into evidence. But we take the position—we resist re-opening the case for further evidence.

Court: Have you anything further to say, Mr. Rivers?

Mr. Rivers: I understood, of course, that counsel would stipulate that certain things could be admitted, and I guess he is making that now contingent upon the Court's ruling as to whether the Court will allow our offering it or not.

Court: If any further evidence is to be admitted, Mr. Rivers, one would think it would be necessary, either by Order of the Court or by stipulation—by Order of the Court finally, in any event—to open the case for the admission of evidence on both sides, and in that event it may be that the plaintiff would wish further time to consider the matter. If the case is to be opened, I think in fairness the order must be that it is open for all purposes and plaintiff and defendants and intervenors can introduce further evidence.

Mr. Rivers: By all means; I so intended.

Court: Since there is no jury involved, my dis-

position is to so re-open it, because it is certainly useful to have before the Court every bit of relevant evidence that may [131] possibly enter into the decision of the case.

The order will be to permit the introduction of evidence, but it can not be concluded at this minute because the plaintiff may have some desire to submit additional evidence too. I know that three of counsel have come a considerable distance for this hearing, and if it is desired to expedite the matter counsel may proceed now with the understanding that the plaintiff may present further evidence at some future time.

Mr. Rivers: Mr. McCutcheon, would you stipulate that we proceed at this time under that ruling?

Mr. McCutcheon: Yes, I will so stipulate.

Court: Well, the order will be that the case is re-opened for the admission of evidence, and if either defendant or plaintiff is not able to present it all today the hearing will be continued until a later time. Any evidence that is now ready may be offered and then counsel may proceed with argument upon their motion or motions and the matter will then be continued until a later date if that is desired.

Mr. Rivers: May it please the Court, I refer to a document which is a photostatic copy of a letter addressed by the Honorable Ernest Gruening, Governor of Alaska, to the President of the Senate, Eighteenth Territorial Legislature, Juneau, Alaska, under date of March 27, 1947. I also refer to a certification by Frank A. Boyle, Territorial Audi-

tor, attached [132] to said photostat, that the photostat is a true and correct reproduction of the original letter referred to; and I offer that as Defendant's Exhibit A.

Court: Is there objection? Let Mr. McCutcheon see it.

Mr. Rivers: I thought I had shown it—pardon me. (Handed document to Mr. McCutcheon.)

Court: Is this the same letter which appears in the Journal?

Mr. Rivers: It is, if the Court please. I might also say that the plaintiff introduced a carbon copy of that letter at the original hearing which was certified to be a true copy of a carbon copy. The defendants now wish to introduce a true copy of the original letter.

Mr. McCutcheon: No objection.

Court: It may be admitted in evidence and marked as Defendant's Exhibit A.

(Defendant's Exhibit A admitted in evidence.)

[Clerk's Note: This exhibit has already been reproduced as Exhibit "A" on page 79 and for economy is not here reproduced.]

Mr. Rivers: With reference to the letter now marked Defendant's Exhibit A, I have a telegram from Lew M. Williams, Secretary of Alaska, containing certain representations regarding that letter and how it was filed, and counsel has said that he would stipulate that if Mr. Williams were here to further testify in this case that Mr. Williams would testify according to the contents of this tele-

gram which I would like [133] to read into the record. Do you so stipulate?

Mr. McCutcheon: I so stipulate.

Court: Very well. It may be read.

Mr. Rivers: This is a telegram dated August 3 at Juneau, addressed to Attorney General Ralph J. Rivers, c/o Gerald Williams, Attorney, Anchorage, Alaska:

“Regarding letter dated March 27 1947 addressed to President of the Senate Eighteenth Territorial Legislature Juneau Alaska from Ernest Gruening Governor of Alaska I hereby certify that a carbon copy of said letter accompanied Senate Bill 105 when said bill was received in the office of the Secretary of Alaska for permanent filing from the office of the Governor and that said carbon copy of letter was the only letter of transmittal of said Senate Bill 105 for permanent filing. Stop Said transmittal letter was attached to said bill and filed as part of the record of permanent filing of said bill in the Secretary of Alaska’s office that said office is the repository for permanent filing of enacted bills and that undersigned is the duly authorized Secretary of Alaska in charge of said records.”

It is from Lew M. Williams, Secretary of Alaska.

Now, may it please the Court, there is one other item—I have here an affidavit subscribed and sworn to on the 8th day of July, 1948, by Ernest Gruening. It is a duplicate original, or identical with, the affidavit attached to the motion for this re-hear-

ing. It contains averments by the Governor that he did execute the letter of March 27, 1947, previously referred to as Defendant's Exhibit A, and I ask that we be allowed to have this affidavit admitted in evidence. (Handed document to Mr. McCutcheon.) [134]

Mr. McCutcheon: No objection.

Court: Without objection it may be admitted and marked Defendant's Exhibit B.

(Defendant's Exhibit B admitted in evidence.)

[Clerk's Note: This exhibit has already been reproduced on page 84 of this printed Record.]

Mr. Rivers: I might add that we are ready to argue. Mr. W. C. Arnold is going to submit additional arguments on the law and pertinent cases but, of course, we would like to have counsel for the plaintiff to avail himself of the opportunity of offering any additional evidence before we offer our arguments.

Court: Does counsel for the plaintiff wish to offer any additional evidence at this time?

Mr. McCutcheon: I think not at this time, your Honor. However, Governor Gruening will be in town tomorrow and it might be that I would like to take advantage of the opportunity of putting him on the stand.

Court: Counsel may reserve the right to introduce evidence later. I am not able to fix the time now because the Court will recess in a few days until some time in September, probably; but counsel will be given an ample opportunity to present any additional evidence he may have and, of course, it will be presented after notice to counsel for the

defendants and counsel for the intervenors. And the order made is an order not for a new trial, but to re-open the case and permit the presentation of additional evidence on the part of all parties.

Counsel may now proceed with argument on the motions.

United States of America,
Territory of Alaska—ss:

I, Ruth Haley, Official Court Reporter of the above entitled court, hereby certify:

That the foregoing is a true and correct transcript of the proceedings indicated in the above entitled matter taken by me in shortland in open court at Anchorage, Alaska, on August 5, 1948, and thereafter transcribed by me.

RUTH HALEY. [136]

TRANSCRIPT OF ORAL OPINION

On September 10, 1948, in open court at Anchorage, Alaska the following proceedings were had:

Court: In the case of Felton Griffin, Plaintiff, v. R. E. Sheldon and others, Defendants, an opinion was given some time ago and thereafter a motion was filed for judgment in favor of the defendants notwithstanding the opinion, or, in the alternative, for a new trial. At the request of the Attorney General of Alaska, Mr. Rivers, the case was re-opened and additional testimony was taken on behalf of the defendants, and I presume also on behalf of the intervenors, although they did not request that such testimony be taken. That testi-

mony has been considered, as well as the extended oral arguments of counsel and [137] the written briefs that have been filed and submitted.

The oral testimony which was offered on behalf of the defendants was designed to show, and did show, that the Governor of Alaska intended the measure to become a law without his signature and he sent the bill, which was signed by both the Speaker of the House and the President of the Senate, to the Office of the Secretary with a carbon copy of a letter addressed by him, as I recall, to the President of the Senate, and the letter, carbon copy of which was so sent to the Office of the Secretary of Alaska, contained a declaration to the effect that the Governor wished, or intended, or designed the Act to become a law without his signature.

However, there was nothing signed by the Governor in the Office of the Secretary to show his intent in the matter. When the case was first tried the only testimony offered on this particular point directly was what purported to be a carbon copy of a letter from the Governor. Now, the original letter, or a photostat copy of it, has been supplied, but that photostat copy comes from the Office of the Auditor who has custody of it.

In order to get this testimony before the Court to show the intentions of the Governor by anything over his signature—anything of which the Court could take judicial notice—it was necessary to take evidence outside of anything that appears with the enrolled bill in the Office of the Secretary of

Alaska. And so the question arises, if any evidence must be taken, is [138] it not proper also to refer to the Journals of the Legislature? I found in deciding the case originally that by reference to the Journals it appeared the Bill had not been read three times and, therefore, was invalid under the Act of Congress creating the Alaska Territorial Legislature and giving it certain powers and providing for its procedure. I still hold to the view that if it is necessary to go beyond the matter that appears upon the face of the record in the Office of the Secretary, then it is the duty of the Court to take into consideration any relevant extrinsic evidence and particularly the Journals of the House and Senate. We all know that in the majority of the states, by Constitution or by Law, reference to the Journals of House and Senate are not only permitted but required when the validity of an Act of the Legislature comes into question.

Moreover, all of the parties hereto, by their attorneys, signed a written stipulation, filed herein on April 5, 1948, that either party might introduce in evidence the relevant Legislative Journals, "for the convenience of the Court in referring to the pertinent parts of the Journals involved in the above-entitled cause". So the Journals were introduced in evidence not only without objection but under stipulation, and such introduction was proper and necessary to determine whether the bill had been rightly enacted into Law.

In this jurisdiction, in my judgment, we are bound by the [139] decisions of the U. S. Supreme

Court in the case of *Field v. Clark*, reported in 143 US, Page 649, and the companion case of *Lyons v. Woods*—perhaps I should not call it a companion case, but it dovetails in with the *Field v. Clark* case—reported in 153 US at Page 649, holding that where the record in the Office of the Custodian of the Law shows that the questioned Act was passed by the House and Senate and signed by the presiding officers of both bodies and approved by the President or Governor, no collateral attack upon it is permissible. The declaration was first made in *Field v. Clark* and then the same doctrine was applied to one of the Territories in the case of *Lyons v. Woods*.

And so in this case had the bill been signed by the Governor the Court would have been obliged to declare it valid even if it had not been read at all in either house because upon its face it would appear to be valid, but if reference must be made to anything beyond the official record of the enrolled bill in the Office of the Secretary, then the Court must also examine the Journals and the Court, I believe, is bound to give effect to what appears in the Journals as to compliance with the Act of Congress concerning the enactment of bills.

Counsel in their learned arguments brought to bear the force of certain decisions or opinions of State Courts cited in the case of *Field v. Clark* some of which go considerably beyond the scope of the declaration of the Supreme Court given in that [140] case and it is urged upon the Court that since the Supreme Court has cited those opinions then

this Court should go as far as any of the State Courts have gone in upholding such legislation. However, it seems pretty clear that appellate courts in citing opinions or decisions of other courts do not thereby give their approval to everything that is contained in those opinions or decisions. My own experience teaches me that no such rule can be followed because frequently an appellate court, and particularly the Supreme Court, will cite an opinion of the lower courts on the general principle, without I am sure, intending to approve everything that was said by the lower court upon the point.

And so we come back to the precise position we were in when the original opinion was written. This bill was passed by both House and Senate—if we can consider it having been passed in the manner in which it was passed, without three readings in the House—without the third reading in the House. At any rate, it was so far passed that it was signed by the Speaker of the House and the President of the Senate and was sent to the office of the Secretary without any declaration in writing from the Governor, signed by him, to indicate that he intended the Act to become a law without his signature, and upon reference to the House Journal I have found that it was not read three times in the House, having been read the third time by number only, which is not in harmony with the Organic Act of Alaska and, therefore, it is invalid.

Now, it is unfortunate that any court any time must declare an Act of the Legislature invalid, but it seems that that has been the duty of courts in certain cases from the beginning of our existence

as a nation, and in cases where the Court is obliged to consider the Journals, if one reading of a bill can be dispensed with then there is no real reason why three readings can not be dispensed with and, finally, the Act of Congress requiring certain procedure for the enactment of bills would be entirely a nullity.

The motion for new trial, or motion for judgment for the defendants in the alternative, are both denied, and Findings of Fact, Conclusions of Law and Decree may be prepared and served and presented to the Court. [141]

I, Ruth Haley, of Anchorage, Alaska, hereby certify:

That I am the official court reporter in the District Court for the Territory of Alaska, Third Division; that I attended the trial of the cause entitled "Felton H. Griffin, plaintiff, vs. R. E. Sheldon et al., defendants and United States Smelting, Refining and Mining Company, a corporation, et al., intervenors, cause No. A-4597", at Anchorage, Alaska, on April 20, 1948 and on August 5, 1948, and on September 10, 1948 and took down in shorthand the testimony given and proceedings had at each of said hearings; that I thereafter transcribed said shorthand, and the foregoing pages numbered 1 to . . . , inclusive, comprise a full, true, and correct statement and transcript of such testimony and proceedings.

Dated at Anchorage, Alaska, this 7th day of October, 1948.

/s/ RUTH HALEY,
Court Reporter. [142]

Thereafter on the 7th day of October, 1948, the court made and ordered entered its "Findings of Fact and Conclusions of Law" and on the same day the court signed and ordered entered its decree granting a permanent injunction.

The above and foregoing is all of the evidence introduced at the trial of said cause and all proceedings had in the trial thereof.

Wherefore, R. E. Sheldon, Ernest F. Jessen, Anthony Zorich and George Vaara, the defendants and appellants, and the United States Smelting, Refining and Mining Company, a corporation, and each of the additional intervenors as appellants, tender and present the foregoing as their Bill of Exceptions in said cause and pray that the same may be settled, allowed and signed and sealed and made a part of the record in said cause by this court pursuant to the law in such cases.

RALPH RIVERS,
J. GERALD WILLIAMS,

By H. W. HAUGLAND,
Attorneys for Defendants.

W. C. ARNOLD,
FAULKNER, BANFIELD &
BOOCHEVER,
MEDLEY AND HAUGLAND,
J. GERALD WILLIAMS,

By H. W. HAUGLAND,
Attorneys for Intervenors.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service by receipt of a certified copy of the proposed Bill of Exceptions in the above-entitled matter is hereby acknowledged.

Dated this 8th day of October, 1948.

McCUTCHEON & NESBETT,

By **S. McCUTCHEON,**

Attorneys for Plaintiff and
Appellee.

[Endorsed]: Filed Oct. 8, 1948. [161]

[Title of District Court and Cause.]

**ORDER SETTLING AND ALLOWING BILL
OF EXCEPTIONS**

Be it remembered that upon this 8th day of October, 1948, the matter of settling the Bill of Exceptions in the above entitled cause came on regularly for hearing, and the Judge of the above-mentioned court being duly advised in the premises, it is hereby Ordered, Adjudged and Certified as to said Bill of Exceptions consisting of ... pages plus exhibits and identifications, as follows, to-wit:

a. That the same has been filed, allowed and certified within the time required by law and the Rules of this Court;

b. That the same contains the complete Transcript of Testimony and evidence before the Court

on the trial of said cause; that it sets forth the rulings of the Court upon all motions for introduction of evidence; all of the oral and documentary evidence [162] given upon the trial of said cause which is necessary to clearly present the questions of law involved in the rulings to which errors are assigned in the Assignments of Error heretofore filed in this cause (save and except plaintiff's exhibits 1, 101, 102, and 103) hereinafter mentioned.

c. That the same is hereby settled, allowed and signed as the true and correct Bill of Exceptions of all matters and things therein contained;

d. That said Bill of Exceptions is hereby made a part of the record of this cause;

e. That this order constitutes the Judge's certificate to said Bill of Exceptions and that the same be placed by the Clerk of this Court at the end of said Bill of Exceptions and attached to the same as a part thereof;

f. That Plaintiff's Exhibits "1", "101", "102", and "103" together with all the other exhibits entered in this case be and they are hereby directed to be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a part of the Bill of Exceptions in this cause for the examination and inspection of said Circuit Court of Appeals, it appearing to this Court that it is proper and advantageous in this appeal that said original exhibits be placed before said last named Court for its examination and inspection. Said exhibits so enumerated and to be

transferred, are hereby made a part of the Bill of Exceptions herein.

Done in Open Court this 8th day of October, 1948, at Anchorage, Alaska.

ANTHONY J. DIMOND,
District Judge.

Approved and Presentation hereby waived. S. McCutcheon, Oct. 8, 1948, Attny. for Plaintiff.

Presented by H. W. Haugland of Counsel for Defts. and Intervenors.

Entered Court Journal No. G 17, Page No. 235, Oct. 8, 1948.

[Endorsed]: Filed Oct. 8, 1948. [163]

[Title of District Court and Cause.]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated by and between the above named parties, plaintiff, defendants and intervenors, through their respective attorneys, that in printing the papers and records to be used on the hearing on appeal in the above-entitled cause for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit the title of the Court and cause in full on all papers shall be omitted except on the first page of said record and that there shall be inserted in place of said title in all papers used as a part of said record the words "Title of Court and Cause." Also that all endorsements on all papers used as part of said record

shall be omitted except the Clerk's filing marks and the admission of service. [164]

Dated at Anchorage, Alaska, this 8th day of October, 1948.

McCUTCHEON & NESBETT,
By S. McCUTCHEON,
Attorneys for Plaintiff.

RALPH RIVERS,
J. GERALD WILLIAMS,
By H. W. HAUGLAND,
Attorneys for Defendants.

W. C. ARNOLD,
FAULKNER, BANFIELD &
BOOCHEVER,
MEDLEY AND HAUGLAND,
J. GERALD WILLIAMS,
By H. W. HAUGLAND,
Attorneys for Intervenors.

[Endorsed]: Filed Oct. 8, 1948. [165]

[Title of District Court and Cause.]

PRAECIPE DESIGNATING CONTENTS OF
THE RECORD ON APPEAL

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to an appeal allowed in the

above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. Complaint.
2. Amended Complaint.
3. Complaint in Intervention.
4. Answer to Complaint in Intervention.
5. Order Allowing Intervention.
6. Answer to Amended Complaint. [166]
7. Answer of Intervenors to Amended Complaint.
8. Reply.
- 8a. Stipulation filed April 5, 1948, relative to Introduction of Certain Evidence.
9. Minutes of proceedings April 20, 1948.
10. Memorandum Opinion.
11. Defendants and Intervenors Motion for Judgment or for New Trial together with Affidavit of J. Gerald Williams and the Exhibits attached to said Affidavit.
12. Minutes of Proceedings August 5, 1948.
13. Minutes of Proceedings September 10, 1948.
14. Findings of Fact and Conclusions of Law.
15. Decree (Please show the date said decree was entered on your civil docket).
16. Order Denying Motion for Judgment or for New Trial.
17. Petition for Allowance of Appeal.
18. Assignment of Errors.
19. Order Allowing Appeal.
20. Citation on Appeal.
21. Acknowledgment of Service of Citation.

22. Bill of Exceptions (Together with all exhibits filed in this case unless the same are incorporated in the Bill of Exceptions).

23. Acknowledgment of Service of Proposed Bill of Exceptions.

24. Order Certifying and Settling Bill of Exceptions.

25. Stipulation re Printing of Record.

26. This Praecipe Designating Contents of Record on Appeal.

27. Acknowledgment of Service of Appellants Praecipe Designating Contents of Record on Appeal.

Dated this 8th day of October, 1948.

RALPH RIVERS,

J. GERALD WILLIAMS,

By H. W. HAUGLAND,

Attorneys for Defendants. [167]

W. C. ARNOLD,

FAULKNER, BANFIELD &

BOOCHEVER,

MEDLEY AND HAUGLAND,

J. GERALD WILLIAMS,

By H. W. HAUGLAND,

Attorneys for Intervenors.

[Endorsed]: Filed Oct. 8, 1948. [168]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service by receipt of a certified copy of the proposed Praecipe Designating Contents of The Record on Appeal in the above entitled matter is hereby acknowledged.

Dated this 8th day of October 1948.

McCUTCHEON & NESBETT,
By S. McCUTCHEON,
Attorneys for Plaintiff and
Appellee.

[Endorsed]: Filed Oct. 8, 1948. [169]

[Title of District Court and Cause.]

AMENDED PRAECIPE DESIGNATING
CONTENTS OF THE RECORD
ON APPEAL

To the Clerk:

You are instructed to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to an appeal allowed in the above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Complaint.
2. Amended Complaint.
- 2a. Motion for Leave to Intervene.
3. Complaint in Intervention.
4. Answer to Complaint in Intervention.
5. Order Allowing Intervention.
6. Answer to Amended Complaint.

7. Answer of Intervenor's to Plaintiff's Amended Complaint.

7a. Reply to Intervenor's Answer.

8. Reply.

8a. Stipulation for Introduction of Evidence.

9. Minutes of Proceedings April 20, 1948. [170]

10. Opinion.

11. Defendants and Intervenor's Motion for Judgment or for New Trial together with the Affidavit of J. Gerald Williams and the Exhibits attached to said Affidavit.

12. Minutes of Proceedings August 5, 1948.

13. Minutes of Proceedings September 10, 1948.

14. Findings of Fact and Conclusions of Law.

15. Decree.

16. Order Denying Motion for Judgment or for New Trial.

17. Petition for Allowance of Appeal.

18. Assignment of Errors.

19. Order Allowing Appeal.

20. Citation on Appeal.

21. Acknowledgment of Service of Citation.

21a. Intervenor's Cost Bond.

22. Bill of Exceptions (together with all exhibits filed in this case unless the same are incorporated in the Bill of Exceptions).

23. Acknowledgment of Service of Proposed Bill of Exceptions.

24. Order Certifying and Settling Bill of Exceptions.

25. Stipulation re Printing of Record.

26. Praecipe Designating Contents of Record on Appeal.

27. Acknowledgment of Service of Appellants
Praecipe Designating Contents of Record on Appeal.

28. Amended Praecipe Designating Contents of
Record on Appeal.

29. Acknowledgment of Service of Appellants
Amended Praecipe.

Dated this 9th day of November, 1948.

RALPH RIVERS,

J. GERALD WILLIAMS,

By J. GERALD WILLIAMS,

Attorneys for Defendants. [171]

W. C. ARNOLD,

FAULKNER, BANFIELD &

BOOCHEVER,

MEDLEY AND HAUGLAND,

J. GERALD WILLIAMS,

By /s/ J. GERALD WILLIAMS,

Attorneys for Intervenor. [172]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service by receipt of a certified copy of the
Amended Praecipe Designating Contents of The
Record on Appeal in the above entitled matter is
hereby acknowledged.

Dated this 9th day of November, 1948.

McCUTCHEON & NESBETT,

By STANLEY McCUTCHEON,

Attorneys for Plaintiff and
Appellee.

[Endorsed]: Filed Nov. 9, 1948. [173]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska,
Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 171 pages, numbered from 1 to 171, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the Praeceptum for Transcript of Record filed in my office on the 8th day of October, 1948; the Amended Praeceptum filed in my office on the 9th day of November, 1948; that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$23.00, has been paid to me by J. Gerald Williams, one of the attorneys for the defendants and appellants and as one of the attorneys for the intervenors and appellants herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 12th day of November, 1948.

/s/ M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division.

[Endorsed]: No. 12097. United States Court of Appeals for the Ninth Circuit. R. E. Sheldon, as Executive Director, Unemployment Compensation Commission of Alaska, Ernest F. Jessen, Anthony Zorich and George Vaara as the Unemployment Compensation Commission of Alaska, United States Smelting, Refining and Mining Company, a corporation, Alaska Laundry, Inc., a corporation, Pacific American Fisheries, Inc., a corporation, Healy River Coal Corporation, a corporation, Juneau Spruce Corporation, a corporation, Western Fisheries Company, a corporation, Wells Alaska Motors, a co-partnership, and Joe Coble, doing business as The Pioneer Cab Company and all others similarly situated, Appellants, vs. Felton H. Griffin, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed November 15, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12097

FELTON H. GRIFFIN,

Plaintiff,

vs.

R. E. SHELDON as Executive Director, Unemployment Compensation Commission of Alaska:
ERNEST F. JESSEN, ANTHONY ZORICH
and GEORGE VAARA as the Unemployment
Compensation Commission of Alaska,
Defendants,

UNITED STATES SMELTING, REFINING
AND MINING COMPANY, a corporation;
ALASKA LAUNDRY, INC., a corporation;
PACIFIC AMERICAN FISHERIES, INC., a
corporation; HEALY RIVER COAL CORPO-
RATION, a corporation; JUNEAU SPRUCE
CORPORATION, a corporation; WESTERN
FISHERIES COMPANY, a corporation;
WELLS ALASKA MOTORS, a co-partner-
ship; and JOE COBLE, d/b/a THE PIONEER
CAB COMPANY, and all others similarly situ-
ated,

Intervenors.

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF THE RECORD
TO BE PRINTED

Come now the appellants, the defendants and
intervenors in the above entitled case and adopt

the Assignment of Errors as their statement of points to be relied on, and pray that the whole of the record as filed and certified be printed in its entirety.

RALPH RIVERS,
J. GERALD WILLIAMS,

By /s/ H. W. HAUGLAND,
Attorneys for Defendants.

W. C. ARNOLD,
FAULKNER, BANFIELD &
BOOCHEVER,
MEDLEY & HAUGLAND,
J. GERALD WILLIAMS,

By /s/ H. W. HAUGLAND,
Attorneys for Intervenors.

[Endorsed]: Filed November 18, 1948. Paul P.
O'Brien, Clerk.



~~ORIGINAL~~

~~Docketed~~

No. 12097

In The United States Court of Appeals
For the Ninth Circuit

R. E. SHELDON, as Executive Director, Unemployment Compensation Commission of Alaska, ERNEST F. JESSEN, ANTHONY ZORICH and GEORGE VAARA as the Unemployment Compensation Commission of Alaska, UNITED SMELTING, REFINING AND MINING COMPANY, a corporation, ALASKA LAUNDRY, INC., a corporation, PACIFIC AMERICAN FISHERIES, INC., a corporation, HEALY RIVER COAL CORPORATION, a corporation, JUNEAU SPRUCE CORPORATION, a corporation, WESTERN FISHERIES COMPANY, a corporation, WELLS ALASKA MOTORS, a co-partnership, and JOE COBLE, doing business as The Pioneer Cab Company, and all others similarly situated,

Appellants,

vs.

FELTON H. GRIFFIN,

Appellee.

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY
OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLANT

RALPH J. RIVERS

Attorney General for Alaska

J. GERALD WILLIAMS

FAULKNER & BANFIELD

MEDLEY & HAUGLAND

W. C. ARNOLD

Attorneys for Appellants

1011 American Building
Seattle 4, Washington

FILED

In The United States Court of Appeals

For the Ninth Circuit

R. E. SHELDON, as Executive Director, Unemployment Compensation Commission of Alaska, ERNEST F. JESSEN, ANTHONY ZORICH and GEORGE VAARA as the Unemployment Compensation Commission of Alaska, UNITED SMELTING, REFINING AND MINING COMPANY, a corporation, ALASKA LAUNDRY, INC., a corporation, PACIFIC AMERICAN FISHERIES, INC., a corporation, HEALY RIVER COAL CORPORATION, a corporation, JUNEAU SPRUCE CORPORATION, a corporation, WESTERN FISHERIES COMPANY, a corporation, WELLS ALASKA MOTORS, a co-partnership, and JOE COBLE, doing business as The Pioneer Cab Company, and all others similarly situated,

Appellants,

vs.

FELTON H. GRIFFIN,

Appellee.

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY
OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLANT

RALPH J. RIVERS

Attorney General for Alaska

J. GERALD WILLIAMS

FAULKNER & BANFIELD

MEDLEY & HAUGLAND

W. C. ARNOLD

Attorneys for Appellants

1011 American Building
Seattle 4, Washington

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In The United States Court of Appeals

For the Ninth Circuit

R. E. SHELDON, as Executive Director, Unemployment Compensation Commission of Alaska, ERNEST F. JESSEN, ANTHONY ZORICH and GEORGE VAARA as the Unemployment Compensation Commission of Alaska, UNITED SMELTING, REFINING AND MINING COMPANY, a corporation, ALASKA LAUNDRY, INC., a corporation, PACIFIC AMERICAN FISHERIES, INC., a corporation, HEALY RIVER COAL CORPORATION, a corporation, JUNEAU SPRUCE CORPORATION, a corporation, WESTERN FISHERIES COMPANY, a corporation, WELLS ALASKA MOTORS, a co-partnership, and JOE COBLE, doing business as The Pioneer Cab Company, and all others similarly situated,

Appellants,

vs.

FELTON H. GRIFFIN,

Appellee.

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY
OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the district court (R. 49) is reported at 78 F. Supp. 466.

JURISDICTION

This is a suit to enjoin the Unemployment Compensation Commission of Alaska from enforcing certain provisions of the Alaska Unemployment Compensation law. A permanent injunction was entered October 7,

1948 (R. 115). Petition for allowance of appeal was filed October 7, 1948, and order allowing appeal was signed October 7, 1948 (R. 125). The jurisdiction of the district court was invoked under the law of June 6, 1900, c. 786, sec. 4, 31 Stat. 322, as amended, 48 U.S.C. Sec. 101, 41 Stat. 1203. The jurisdiction of this Court rests on section 128 of the Judicial Code, as amended, 28 U.S.C. Sec. 225 (a).

QUESTIONS PRESENTED

1. Whether the district court of Alaska should not take judicial notice of and give full weight to an act of the legislature of Alaska which has been certified and enrolled and published as a law of the Territory.

2. Whether it became the duty of the court to refer to the legislative journals to determine if an enrolled bill had been lawfully enacted because of the fact that the Governor of Alaska had not signed and approved the bill.

3. Whether it is proper for the court to make a search of the legislative journals to determine if a bill had had a "sufficient reading" in the House where the evidence conclusively showed that after the passage of the bill by both Houses it was forwarded to the Governor and by him returned with the intent that it become law without his signature and thereafter was regularly certified and forwarded to the Secretary of Alaska for permanent filing and became a fully enrolled bill.

4. Whether the legislative journals are competent to prove or disprove the sufficiency of the question of readings where the organic act of Alaska does not require that the reading of a bill be entered in the journal.

5. Whether it is not a sufficient compliance with legislative proceedings in Alaska for the legislative body on a third reading of a bill to read it by number only.

6. Whether the plaintiff, who has no interest in the litigation other than by virtue of his alleged status as a resident and taxpayer of Alaska, is a person with sufficient interest to maintain a suit which challenges the validity of a public law and seeks to restrain the members of the Alaska Unemployment Compensation Commission from enforcing said law.

SPECIFICATION OF ERRORS

The assignment of errors (R. 122) may be summarized as follows:

1. The court erred in finding that the plaintiff is a citizen and taxpayer of the Territory of Alaska.

2. The court erred in failing to adopt the conclusive presumption rule and in failing to take judicial notice of the fact that Chapter 74 of the Session Laws of Alaska, 1947, was the duly enrolled, printed and published law of Alaska and in failing to grant a judgment of dismissal.

3. The court erred in examining and considering the journals of the legislative bodies of the Territory of Alaska to determine whether a bill had been lawfully enacted.

4. The court erred in its conclusion that Chapter 74 of the Session Laws of Alaska, 1947, was invalid because it failed to have three readings in the House of Representatives.

5. The court erred in entering a restraining order

enjoining the defendants from granting credits to the employers of Alaska as provided in said Chapter 74.

6. The court erred in granting a judgment to the appellee for the reason that appellee had no interest in the litigation sufficient for him to maintain the action.

STATEMENT

This action was instituted by the appellee by complaint verified July 11, 1947, to enjoin the enforcement of an amendment to the Unemployment Compensation Code of Alaska which was adopted by the legislature in its regular session of 1947. That amendment provided for a system of credits to be granted to qualified employers of labor on an experience merit basis. The suit was directed against the executive director and the individuals who comprised the members of the Alaska Unemployment Compensation Commission.

Appellee alleged that he was a resident and taxpayer of Alaska and generally that the legislature had passed an invalid law which if it were enforced by the defendants would result in a wrongful and unlawful loss of funds of the Territory of Alaska, and which would result in loss to the taxpayers thereof. The complaint alleged four grounds of invalidity of the act. Briefly these are:

1. That the enacting clause was inadequate.
2. That the bill was not lawfully passed because a motion to reconsider in the House was not given proper consideration.
3. That the bill was vetoed by the Governor.
4. That the bill in its passage by the House did not

receive three separate readings as required by the organic act of Alaska.

Appellee prayed that the said law be found invalid and that the defendants and each of them be enjoined and restrained from issuing credit notices or otherwise establishing credits for employers under the provisions of said Act.

A complaint in intervention was regularly filed by the intervenors who alleged that they were employers of labor in Alaska, contributors of large sums of money to the Unemployment Compensation fund, and directly affected by the litigation. Upon due proceedings an order was entered granting intervention (R. 32). Intervenors specifically denied that appellee was a taxpayer or a resident of Alaska and defendants and intervenors denied generally the allegations of the complaint. Upon these pleadings issue was joined.

The cause came on for trial at Anchorage, Alaska, on April 20, 1948. The appellee offered no evidence whatsoever regarding his status or interest in the litigation. The court took the matter under advisement and on June 28, 1948, filed a written opinion in which the court found that the enacting clause was adequate; that the motion to reconsider in the House was given proper consideration and that the bill was not vetoed by the Governor. The court in its memorandum stated that the conclusive presumption rule as announced in the the case of *Field v. Clark*, 143 U.S. 649, would be applied and that it would be bound to dismiss the cause of action "had the Governor actually signed the bill in approval thereof." The court further found that be-

cause of the fact that a carbon copy of a letter from the Governor of Alaska to the Senate was the only letter of transmittal of the bill when it was sent to the Secretary of Alaska for permanent filing it then became a duty of the court to refer to the legislative journals to determine if the bill had been validly enacted; that after construing the entries in the journal of the House, the court concluded that the said bill did not have a third reading in compliance with the organic act of Alaska and that the bill was not lawfully enacted. The court suggested that a judgment in accordance with the memorandum opinion should be entered.

Thereafter, upon motion duly made by the defendants and the intervenors, the court on August 5, 1948, granted a motion to reopen the case and on that date heard further evidence. The evidence presented by defendants and intervenors consisted of documents to supply proof of the fact that the Governor had returned the bill in question with the intent that it should become law without his signature and that it was thereafter forwarded to the Secretary of the Territory for permanent filing and was regularly authenticated, published and proclaimed as a law of Alaska. The court took the matter under advisement.

Thereafter on September 10, 1948, in open court, the court rendered its oral opinion stating that it adhered to its original memorandum and directed that findings and judgment be presented (R. 145). The judgment was entered and filed on October 7, 1948 (R. 115). This appeal followed (R. 125).

There was introduced in evidence the House and Senate journals covering the Eighteenth Session of the

Alaska legislature. These are not reprinted in the transcript of record. Approximately eight pages of the journal only are pertinent to this case and for the convenience of the court, appellants annex pages 843 to 850 of the House journal and Rule 54 of the House to this brief as an appendix.

SUMMARY OF ARGUMENT

I.

The legislature of Alaska at its Eighteenth regular session which convened on the 27th day of January, 1947, enacted Senate Bill 105. This bill was regularly certified by the presiding officers of the legislative bodies and became an enrolled bill. It was permanently filed with the Secretary of Alaska and thereafter was published as Chapter 74 of said sessions laws.

Appellee instituted the action in a representative capacity as a taxpayer. Under the applicable decisions the court should take judicial notice of the law and conclusively presume that all proper procedural steps were taken and that there were no irregularities in the passage of the law. The enrolled bill or conclusive presumption doctrine precludes a consideration of the legislative journals for the purpose of invalidating the official certification of the bill.

II.

The court below refused to apply the enrolled bill doctrine for the reason that the Governor of Alaska had not signed the bill in approval thereof. The absence of the Governor's signature is not pertinent to

the question. The bill became a law without the Governor's signature. The conclusive presumption rule applies when the lawmaking department has done everything necessary to complete the record of the enactment of the law. This record was completed when the bill was permanently filed with the Secretary of Alaska.

The enrolled bill doctrine has been applied in numerous cases where the Governor permitted a bill to become law without his approval. And also in numerous instances where a law has been enacted over a disapproving message or a direct veto. In none of those cases has the Governor's signature appeared on the bill in approval thereof.

III.

It was error for the court to make a complete and comprehensive examination of the journals for the purpose of determining whether the legislature had strictly complied with the procedural requirements. The court may examine the journals in an attempt to construe the language used or to arrive at the legislative intent or to learn the history of legislation. Such examination is not made for the purpose of invalidating legislation.

When the court in this case had found from the journals, or other evidence, that the legislative assembly had regularly certified the bill and that it had been forwarded to the Secretary of Alaska for permanent filing, the search should have ended. Senate Bill 105 was certified by its legal custodian, properly authenticated and complete in form. Judicial investigation ends at that point.

IV.

The legislative journals are not competent to prove or disprove the question of whether the bill had actually had a third reading. This is the rule of the enrolled bill doctrine. A further reason is that there is no requirement of the Organic Act or Constitution of Alaska which makes it mandatory to record in the legislative journals the manner of reading of a bill or of the fact that such reading occurred. Neither has the legislature by its own rules required that such entry be made. The journal is kept by the chief clerk or under his direction by some other employee of the legislature. These entries are merely clerical in nature. The trial court examined the journal of the House and found an entry signed by the chief clerk that the bill was read the third time by number only. On the strength of that single entry, the law was declared invalid. Evidence of that type should not be used to destroy the effect of the solemn authentication and enrollment of the bill by the legislative officers.

V.

Senate Bill 105 had received two complete readings in the House. It then came before that body for final consideration. On this occasion, the bill was discussed fully. Several amendments were proposed. These were read section by section. A general debate was had. The amendments were voted down. Appellants contend that during the course of this debate and discussion the Senate Bill was fully read and that the record so shows.

The Constitution does not in terms direct that the

reading shall be at length, or in full, or out loud, or by any particular person. Under the circumstances where a bill has been under consideration continuously by the House for several hours, such record shows a sufficient reading of the bill.

VI.

Appellee alleged that he was a resident and taxpayer of Alaska; that the legislature had invalidly passed Senate Bill 105; that its enforcement would result in a loss of funds to the Territory and taxpayers of Alaska. Appellee did not prove that he was a resident and taxpayer of Alaska or that he had any interest in the suit.

The question raised in the case is purely political. The appellee has no property rights or other interest which were put in jeopardy. Nor did the appellee sustain injury or loss by reason of the enforcement of the law.

The courts will only consider actions challenging legislative enactments where the party who invokes the power of the court shows that he has sustained some injury as a result of its enforcement. Such a situation is entirely lacking in this action. The appellee has no justiciable interest and therefore the court does not have jurisdiction to entertain this action.

ARGUMENT**I.****The District Court Erred in Failing to Take Judicial Notice of a Law of Alaska and in Failing to Give Full Force and Effect to Said Law.**

It is the contention of the appellants that the court below should have taken judicial notice of Chapter 74 of the Session Laws of Alaska, 1947 under the enrolled bill doctrine. It would then follow that the appellee's complaint should have been dismissed.

The evidence conclusively shows that the said law, known as Senate Bill 105, was duly passed by the Senate and the House; that it was then regularly sent to the Governor for his consideration. The Governor did not sign or approve the bill. Neither did he veto it. Instead the Governor sent a letter to the President of the Senate in which he notified that body that he had transmitted the bill to the office of the Secretary of Alaska for permanent filing and that the bill became a law without his signature. The bill was regularly enrolled and certified by the presiding officers of both houses and was regularly permanently filed with the Secretary of Alaska and was thereafter by him officially published as a law of Alaska under his official authentication.

The appellee introduced but one witness at the trial of the case. This was the Secretary of Alaska who identified a certified copy of the said bill and testified that it had been passed by the legislature and was lodged in his official custody as Secretary (R. 133). Appellee offered no other testimony except such as

could be found from a search of the legislative journals which were introduced as exhibits. Appellee then rested. Under the decisions hereinafter set forth, upon this state of the record, the enrolled bill doctrine would require that the action be dismissed.

Appellants introduced no oral testimony but did file certain affidavits and certificates all of which tended to show that the bill did become law without the Governor's signature and that it was duly certified and permanently filed as required by law (R. 102-140, 141, 142). The court below instead of applying the enrolled bill doctrine has searched the legislative journals in a deliberate attempt to ascertain if the legislature has complied with all procedural and constitutional requirements. Thus also there was overlooked the further rule that the courts will indulge every presumption in favor of a law.

This case should be controlled by the decision of *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294 and the numerous other authorities from a majority of the jurisdictions throughout the country.

Field v. Clark involved an action by certain importers who challenged the validity of a tariff act adopted by Congress. From a judgment against them in the Circuit Court of the Northern District of Illinois, said importers appealed to the United States Supreme Court. One of the main contentions of the appellants was that the Congressional records disclosed that the bill as approved by the President was not the same bill that was certified by the presiding officers of the legislative bodies and that the bill was not a valid act. The

court specifically determined that it was necessary for it to "inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill * * * was or was not passed by Congress." The court further noted that the appellants rested their contention upon the fact that the Constitution required that "each house shall keep a journal of its proceedings, and from time to time publish the same, * * * and the yeas and nays * * * be entered on the journal" and commented that it was assumed in the argument that the object of this clause was to make the journal the best, if not conclusive evidence upon the issue as to whether the bill was in fact passed by the two houses of Congress.

But the court held that such was not the rule to be followed. The court refused to consider the legislative journals or the congressional records and adopted the conclusive presumption rule and stated at page 303 (36 L. ed.):

"* * * The respect due to co-equal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

The court then discussed the argument that if access be not had to the journals, it would create possibility for conspiracy on the part of the presiding officers and states, page 303:

"Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate

branch of the Government. The evils that may result from the recognition of the principle that an enrolled Act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.

“The views we have expressed are supported by numerous adjudications in this country * * *”.

Judgment of the Circuit Court was affirmed.

The *Field* case has never been overruled or qualified by the Supreme Court. It was followed in *Lyon v. Woods*, 153 U. S. 649 where the Supreme Court again adopted the enrolled bill and applied the rule to an Act of a Territory (Ariz.) of the United States.

The entire doctrine is completely discussed in a well-considered opinion of the Supreme Court of New Mexico in the case of *Kelley v. Marron*, 153 Pac. 262. In that case a taxpayer challenged the validity of an Act and contended that the journal of the house showed that the legislature did not comply with the Constitutional requirement that a bill should be publicly read and entered in the journal. That court discussed the matter fully and quoted at length from a great number of decisions, and concluded that the statute having become enrolled by the legislative body, the court would

not concern itself over the question of the procedure followed by the legislative body during the course of its enrollment. The enrolled bill was given full weight.

The rule has been applied in a great number of cases from numerous jurisdictions. Since the points hereafter discussed in points II and III are so closely related to point I, we will not burden the court with further citations here. All of the following cases are pertinent to this part of our brief.

Applying the conclusive presumption rule to the instant case, it is apparent that error has been committed by the court in searching the legislative journals and concluding therefrom that Chapter 74 of the Session Laws of Alaska, 1947, was not validly enacted notwithstanding its enrollment and authentication.

II.

The Absence of the Signature of the Governor Upon the Bill Did Not Give the Court Occasion to Examine the Journals.

The court below recognized that *Field v. Clark* is the controlling authority (R. 57) and that the enrolled bill doctrine would have been applied in this case "had the Governor actually signed the bill in approval thereof." But that since the governor's signature was lacking the "unimpeachable" presumption was completely overthrown and that it then became necessary for the court to examine the journals.

Appellants contend that the signature of the Governor is not a prerequisite to the validity of a law. The legislative enactments become law in those cases where

the Governor permits it to become such without his signature and also in those cases where the legislature passes the bill over the Governor's veto. In both of those instances the signature of the Governor would not appear on the bill in approval thereof yet the bill becomes law. It becomes a law when the law making power has done everything necessary to complete its enrollment and filing as a duly enacted law.

A careful reading of *Field v. Clark* and an examination of the authorities there cited convinces us that the Supreme Court did not intend to, and did not, limit the application of the enrolled bill doctrine only to cases where the bill was actually signed by the Governor. The decision does not by its terms contain any such statement. The facts disclose that the President had actually signed the bill but no point was made of this feature nor was there any discussion concerning it.

Field v. Clark in support of its conclusions cited thirteen cases all of which had applied the enrolled bill doctrine. These cases are: *State ex rel. v. Young*, 32 N. J. L. 29; *Chosen Freeholders v. Stevenson*, 46 N. J. L. 173; *Standard U. C. Co. v. Attorney General*, 46 N. J. L. Eq. 270; *Sherman v. Story*, 30 Cal. 253; *People v. Burt*, 43 Cal. 560; *Ex parte Wren*, 63 Miss. 512; *Weeks v. Smith*, 81 Me. 538; *Brodnax v. Groom* Comm. 64 N. C. 244; *State v. Swift*, 10 Nev. 176; *Evans v. Browne*, 30 Ind. 514; *Edgar v. Randolph Cnty. Comm.*, 70 Ind. 331; *Pac. R. R. Co. v. Governor*, 23 Mo. 353; *Louisiana Lottery Co. v. Richoux*, 23 La. Ann. 743.

In not one of those cases was a point made of the presence or absence of the Governor's signature on the

bill involved. In approximately half of the cases the facts merely recited that the bill had passed the legislature and had received the approval of the Governor. However, in several of the cases the facts disclosed that the signature of the Governor was not on the bill. Nevertheless, the rule was applied.

In *Weeks v. Smith* the Governor had vetoed the bill. Obviously this case negatives the contention that the Governor's signature was necessary.

In *Brodnax v. Groom Comm.*, while there was no discussion over the question of signing, the specific question was stated by the court (64 N. C. 247) as follows:

"Suppose an act of Congress is returned by the President, with his objections, and the Vice President and the speaker of the House certify that it passed afterward by the constitutional majority: Is it open for the courts to go behind the record and hear proof to the contrary?"

We note that the question does not include reference to the approval by the Governor.

In *Evans v. Brown* the facts are almost identical with the instant case. There the Governor permitted the law to become effective without his signature. He wrote a letter which accompanied the bill when it was transmitted to the Secretary of State for filing and stated that he understood that the legislature was not legally in session when it passed the bill and that therefore he understood the bill would not become a law. The complainants specifically pleaded portions of the journal entries in their attempt to set aside the bill.

The Indiana Supreme Court stated the questions as follows (95 Am. Dec. 712) :

“1. Must the courts of this state take judicial notice of what is and what is not the public statutory law of the state?

“2. When a statute is authenticated by the signature of the *presiding officers of the two Houses*, will the courts search further to ascertain whether such facts existed as gave constitutional warrant to those officers to thus authenticate the act as having received the legislative sanction in such manner as to give it the force of law?”
(Italics ours)

The court concluded it could not look beyond the enrolled and authenticated act and stated, page 717:

“This exact question has received the consideration of other American courts, who have thoughtfully and with careful steps reached the conclusion that the authentication of the presiding officers of the legislature is conclusive evidence of the proper enactment of a law, and that they cannot look elsewhere to falsify it: *State ex rel. etc. v. Young*, 5 Am. Law Reg., N. S., 679 (Sup. Ct. N. J.); *Pacific R. R. v. Governor*, 23 Mo. 353 (66 Am. Dec. 673); *Duncombe v. Prindle*, 12 Iowa, 1; *Eld v. Gorham*, 20 Conn. 8; *Fouke v. Fleming*, 13 Md. 392; *People v. Supervisors of Chenango*, 8 N. Y. 317; *People v. Devlin*, 33 Id. 269.”

In the case of *Edgar v. Randolph County Comm.*, there was involved purely a question of the construction of language used in the legislation. The court applied the rule and stated that whenever a statute has been authenticated by the signature of the *pre-*

siding officers of the two legislative houses it will be given conclusive weight. Clearly that case negatives the contention that the Governor's signature is essential.

The Missouri case of *Pac. R. R. Co. v. Governor* was a case where the measure was passed over a veto. Therefore, the decision expressly negatives the statement of the court below in the instant case, that the measure must be approved by the Governor in order to apply the doctrine.

Thus it appears that in five of the said thirteen cases the Governor's signature did not appear in approval of the bill. In none of the cases was there any suggestion that the signature of the Governor was pertinent to the question of whether the bill would be applied.

There are numerous additional cases to the effect that the signature of the Governor is not one of the steps required in order to make applicable the conclusive presumption rule. In the Arizona case of *Clark v. Boyce* (1919) 185 Pac. 135 the bill was not signed or approved by the Governor. It carried a notation as follows:

"This bill having remained with the Governor ten days, (Sundays excluded) after the final adjustment of the legislature, and not having been filed with his objections, has become a law this 26th day of March, 1919."

and was signed by the Secretary of State. The court stated on page 138:

"The Legislature has all power not prohibited to it by the state or federal Constitution. The

Governor can exercise only such power as is granted to him by the state Constitution. Functioning as a part of the Legislature, his acts are negative in their nature. Under no Constitution, federal or state, so far as we are advised, is his approval absolutely essential, for they all contain provisions by which bills may become laws without his signature—as where he keeps the bills in his possession without action for three days or five days or ten days as the case may be, the legislature being in session. His veto is not absolute, but qualified, as, under most Constitutions, the Legislature may pass the bill over his veto. *Harpending v. Haight*, 39 Cal. 189, loc. cit. 201, 13 Pac. St. Rep. 189, loc. cit. 201, 2 Am. Rep. 432; 12 R. C. L. 1005. According to the appellee's contention, the Governor must either sign the bill or veto it. Failing to do either, the bill is destroyed even though it may have received the unanimous vote of both houses. We think such a construction would indict the people of doing something far from their intention. As we shall see later, no Governor of the state has thought or assumed he possessed such absolute power of veto, nor have the people or the legislature thought so.

“If we give this troublesome expression a literal meaning, it involves the negation of what we know to be facts. We know, notwithstanding, that the Governor has nothing whatever to do with a bill, emergent or otherwise, until after its final passage by the Legislature. ‘Every measure when finally passed shall be presented to the Governor for his approval or disapproval,’ is the language of the Constitution (section 12, art. 4). While he is an arm of the Legislature, he has nothing to do with the introduction or passage of bills. He cannot put

into a bill or take out of a bill an emergency declaration or anything else.”

The case of *State ex rel. Dunbar v. State Board*, 140 Wash. 433, has many features making it exceedingly pertinent to the case at bar. There the Governor had originally vetoed the bill. After its passage over the veto, it was not recertified by the presiding officers of the legislature. Neither did it carry any statement of these facts when it was transmitted to the Secretary of State for permanent filing. The Washington court stated at page 445:

“An examination of these sections shows that it is mandatory that the presiding officers of the two houses of the legislature shall sign the bill upon its original passage, but that there is no provision for such signature upon a repassage after veto; that, after a veto, ‘*it shall become a law*’ when two-thirds of the members of each house have voted to pass it over the governor’s veto. The way is left open for the legislature to provide by rule for the manner of authentication. There is no question that if the constitution had provided, upon a repassage of a vetoed bill, that the designated officers should sign it, the absence of such signature on the enrolled bill in the secretary of state’s office would render that bill invalid; but, in the absence of any constitutional provision relating to this matter, the legislature under its inherent power has the right to adopt any procedure that it sees fit by which to transmit to the secretary of state the information that the bill has been finally passed and present the enrolled bill to that office for filing.’

The court applied the enrolled bill doctrine.

To the same affect, see

Reed v. Jones, 6 Wash. 452, 34 Pac. 201;

Smithie v. State (Florida 1924) 101 So. 276.

In *Bennet Trust Co. v. Semgstacken* (Ore. 1911) 113 Pac. 863, the Oregon court took judicial notice of the public and private acts of the legislative and executive departments and concluded therefrom that the bill having passed the legislative assemblies was presented to the Governor; that he did not return it to the legislative within five days; that under such circumstances, the bill became law without his signature. The court stated at page 867:

“Under such circumstances, the Constitution expressly says the bill shall be a law without his signature. We conclude that in respect to the act in question the legal process of making it a law was complete when the Governor did not return the bill to the house whence it originated within five days from the date it was presented to him, and that all its provisions, including the emergency clause, became effective at once on the completion of that process.”

In *State ex rel. Galman v. Lewis* (S.C. 1936) 186 S.E. 625, the court after adopting the enrolled bill rule and citing *Field v. Clark*, stated at page 629;

“The enrolled bill appears entirely regular on its face. It was duly signed by the President of the Senate and by the speaker of the House of Representatives, was duly and regularly passed by the constitutional majority required under its recommendation when returned to the House and the Senate by the Governor with his objections, and filed in the office of the Secretary of State.”

In *Goddard v. Kirkpatrick* (Okla. 1943) 141 P. (2d) 292, the bill was not signed by the Governor but was permitted to become law without his signature. The court stated:

“Upon the issue of whether this court will look upon the enrolled bill signed by the presiding officers of the two houses of the legislature and in effect approved by the Governor’s acquiescence and his affirmative act in transmitting the bill to the official registry, we may bear in mind the language of the Supreme Court of the United States in *Field v. Clark*, 143 U.S. 649. This court committed itself to the doctrine there stated in the early decision of *Atchison, Topeka & Santa Fe Railroad Co. v. State*, 113 Pac. 921.”

The same rule was also applied by that court in *in re Block*, 149 P.(2d) 269, where the bill also was permitted to become law without the Governor’s signature.

See also

Perkins v. Lucas, 197 Ky. 1, 246 S.W. 150.

III.

The Court Below Erred in Examining the Journal of the House to Determine if the Bill Had Three Readings.

The court below held that since it could not apply the enrolled bill rule it became necessary to make a complete and comprehensive study of the journal (R. 58). Such search disclosed that the bill did not have a sufficient third reading in the house.

The answer to the foregoing is found by applying the rule which of course does not permit examination of the journals to impugn the enrollment and authen-

tication of the bill. Appellants further contend that when the court has examined the journals and the journals give satisfactory (and in this case, conclusive) proof that the Governor had permitted the bill to become a law without his signature, the investigation should have ended.

The courts do, on occasion, examine the legislative journals. Such examination however is for the purpose of construction, or to arrive at legislative intent, or to sustain legislation. It is not made for the purpose of invalidating the certificate of authentication.

The case of *Edgar v. Board of County Comm., supra*, one of the cases cited in *Field v. Clark*, is directly in point. In that case, the legislature had passed an act fixing additional salaries for County Auditors. The question arose over the construction of the language used in the act. It was also contended that the bill was invalid. The court after discussing, and adopting the enrolled bill rule stated at page 338:

“* * * That the authentication of the presiding officers of the legislature is conclusive evidence of the proper enactment of a law; and that the courts cannot look elsewhere to falsify it. *Evans v. Brown*, 30 Ind. 514. But it has never been held by this court that for the *purpose of construction or interpretation, and with a view of ascertaining the legislative will* and intention in the enactment of a law, the courts may not properly resort to the journals of the two legislative bodies to learn therefrom the histories of the law in question, from its first introduction as bill until its final passage and approval.” (Italics ours)

In *Hovey v. State* (Ind.) 21 N. E. 21, a mandamus

action was brought against the Governor of Indiana who defended on the ground that the bill involved was not properly authenticated and attempted to show that the bill had never been signed by the Governor. The court stated at page 26:

“* * * An Act may become a law in several ways without the signature or approval of the Governor, and where, as in this case, an enactment is certified by the legal custodian, properly authenticated and complete in form, *judicial investigation is at an end.*” (Italics ours)

In *Perkins v. Lucas*, *supra*, the Kentucky court refused to look to the entries in the journals to overthrow the presumption established by the due authentication.

In *Pac. R. R. Co. v. Governor*, *supra*, also one of the cases cited in *Field v. Clark*, the court said at page 681:

“Upon the whole, we are of the opinion that the objections taken against the mode of passing this law by the general assembly on its reconsideration are untenable; that the Constitution and law precludes an inquiry as to the existence of such objections. * * *”.

So also in *McDonald v. State*, 80 Wisc. 407, 50 N. W. 185 the court held that the courts will take judicial notice of the contents of the journals of the two houses of the legislature far enough to determine whether an act published as law was actually passed but that (page 186)

“When it appears that an Act was so passed, no inquiry will be permitted to ascertain whether the two Houses have or have not complied strictly with their own rules in their procedure * * *”.

In *Wrede v. Richardson* (Ohio 1907) 82 N. E. 1072, the charge was made that the bill had never been presented to the Governor. The court refused to entertain such evidence stating

“That the Secretary of State is the official custodian of our statutory laws, and we have long been familiar with the rule founded upon statutes *that his certification is conclusive as to what that law is.*” (Italics ours)

All of the foregoing authority is but a reiteration of the logic and reasoning of the cases following the enrolled bill doctrine. The court erred in considering the journal entries in an attempt to invalidate the law.

IV.

The Legislative Journals Are Not Competent to Prove or Disprove the Question of Whether the Bill Was Actually Read.

In discussing this part of our brief, we will refrain from reference to any of the decisions from jurisdictions which follow literally the doctrine of *Field v. Clark*. Those decisions obviate discussion of this point.

There are certain jurisdictions wherein the courts do resort to the legislative journals in an attempt to determine whether a law was validly enacted. However, in most of these jurisdictions a distinction is made between the cases where the Constitutional provisions with respect to journal entries may be held to be mandatory or simply directory. If the Constitution requires that the voting in the house be recorded in the journal such may be held to be a mandatory requirement. But if the Constitution does not require the fact to be recorded in the journal, then such a provision is

held to be directory only. The courts should not consider the journal entries unless the Constitutional provision is mandatory.

The Organic Act of Alaska (Sec. 479 C. L. A. 1933) imposes a duty on the legislature to keep a journal. It does not require that there be entered in the journal the fact that bills are read or the number of times that they are read and therefore the entry in the journal of the fact of reading is not an item required to be made at all. Appellants contend that the entry actually made in the journal can have no force in the instant case.

This identical point is involved in the case of *Vinsant v. Knox*, 27 Ark. 266. The Arkansas Constitution provided that every bill should be read three times on three different days in each house. It was contended that the journals affirmatively showed non-compliance. The court stated at page 278:

“* * * but there is no Constitutional provision that their observance should be evidenced by an entry upon the journals. If there were such a provision the failure of the journals to show the observance of these requirements would doubtless render invalid the legislative acts. *But in the absence of such provision*, it must be presumed that these requirements have been complied with, whether evidenced by an entry upon the journals or not so evidenced, the bills having been put upon their final passage and passed.” (Italics ours)

That court further stated “that every reasonable intendment” is to be taken in favor of the validity of the act.

We quote from *State v. Carley* (Fla. 1925) 104 So. 577 at page 580:

“The Constitution provides (Art. 3, Sec. 17) that ‘every bill passed by the legislature’ shall be read by its sections on its final passage in each house, but it does not require an entry to be made in the journals that a bill was so read; therefore the courts will conclusively presume that a bill was read by its sections on its final passage in each house, unless the contrary clearly appears by the journals.”

and in *Davidson v. Phelps* (Ala. 126) 107 So. 86, the court stated at page 88:

“We find a suggestion * * * that the journals of the house and senate discloses that the bill in its passage was not read three times in each house as required by Section 630 of our Constitution. *It is not necessary to the validity of a law that the journal disclose that the bill was read three times.*” (Italics ours)

The court upheld the act.

This rule is reiterated in *re Ellis* 55 Minn. 401, 23 L.R.A. 287, where the court states (page 292 A.L.R.)

“Every bill signed and approved as required by the Constitution is presumed to have been properly passed. And, as held in *State v. Peterson*, 38 Minn. 143, the absence from the journal of either house of an entry showing that a particular thing was done, is no evidence that it was done, *unless the Constitution required the entry to be made*; and there is no such requirement in respect to the reading of a bill on three different days, or its passage under a suspension of the rule. The objection therefore is not well taken.” (Italics ours)

The case of *Sherman v. Story*, 30 Cal. 253, also one of the cases relied on by the court in *Field v. Clark*, is one of the leading early cases adopting the enrolled bill doctrine. The court refused to consider the entries in the journals. Part of the decision discusses the exact point of the due authentication of a bill which has become law without the approval of the Governor and the question of the effect to be given to the entries in the journals which might disclose some irregularity in its passage, we quote page 277:

“But there is no provision or law declaring how the Journals shall be authenticated, or what shall be their effect. There is nothing requiring the ayes and noes to be entered in any case, except at the option of three members. Even when an Act is returned without the approval of the Governor, although there is a provision requiring the question to be taken by ayes and noes, and that it be passed by a majority of two thirds of the members of both Houses present, there is none requiring the ayes and noes to be entered on the Journals, unless demanded by three members present, under section eleven. In this respect our Constitution differs from those of New York and Illinois, and the whole question of the effect of the Journals as evidence of the acts of those bodies is left open. They are still, like the Journals of Parliament, mere memorials — evidence for some purposes, perhaps, but not for all. They are not records in the proper sense of that term. The mode of authenticating statutes passed notwithstanding the objections of the Governor, and those which become laws by being retained by the Governor more than ten days, as provided in said Section 17, Article IV, is prescribed in the Act of 1852. (Laws

1852, p. 112.) When thus authenticated they are again "presented to the Governor, to be by him deposited with the laws in the office of the Secretary of State." (Sec. 1.) When so authenticated and deposited they become records. There is nothing in the Constitution, then, that requires or authorizes us to avoid, correct or in any way modify, by aid of the Journals, the Acts of the Legislature properly enrolled, authenticated and deposited with the Secretary of State as records of the Act, and we know of no provision of the statute imparting to the Journals any greater dignity than that which pertains to the Journals of Parliament. Much less is there any authority for resorting to the bill as originally introduced, with the loose tags appended containing proposed amendments, and the memoranda of the action endorsed, or to parol evidence *for the purpose of impeaching the record.*"

In the instant matter the Clerk of the House made his entries in the journal to the effect that the bill was read "by number." There is no testimony that such entry was true or that there was no further or additional reading. The Clerk was not required by law to make that entry. Opposed to that type of evidence is the certificate of the proper officers of its due enactment. This certificate is a solemn act required by law. The legislative journals should not have been considered.

V.

It was a Sufficient Reading for the House to Read Senate Bill 105 By Number Only on the Third Reading, Where the Record Indicates That the Whole Bill Was Discussed Section By Section and Fully Debated.

After Senate Bill 105 had received its second reading in the House, it received more than the ordinary attention. This is recited in the journal of the House, pages 843 to 850. These pages are devoted almost entirely to the consideration given the bill by the House. It was practically the only matter considered by the House for a period of several hours. Two separate sets of amendments were offered during this consideration. The rules were suspended and the floor was given to Mr. Marshall Keep, attorney for the Unemployment Compensation Commission. The proposed amendments were to separate sections and were offered section by section. The House rules (54) p. supra, provide that no amendment shall be considered until it shall have been sent to the desk in writing and read by the Clerk. We think it safe to assume that the amendment is annexed to the original and that the original is likewise read. The amendments were debated, they were voted down and the yeas and nays of the members were recorded in the journal.

The bill was read twice at length and while the journal does not show that it was formally read a third time, it seems safe to say that in the discussion of these amendments the Senate Bill must have been in effect read several times and at least read fully the necessary third time.

This was the fifty-fifth day of the Session. The Ses-

sion was still operating at 10:30 P.M. It would not be strange that the members of the House might desire to suspend the rules and shorten the time which would be consumed in again rereading the bill. Appellants contend that the journal entry on the third reading is not controlling.

There is no provision in the Organic Act commanding just when the third reading must take place. Section 13 simply says there must be three separate readings in each House. It does not say that these readings must be on any particular time or in any particular manner. As stated by our own Circuit Court of Appeals in effect in the *Boswell* case, 96 F. (2d) 239, every presumption must be indulged in favor of the validity of an act of the legislature and of course in favor of the regularity of its enactment.

The purpose, of course, of requiring three separate readings is to give full notice and opportunity for discussion and to avoid hasty legislation; and this purpose is certainly a very requisite one. However, there are thousands upon thousands of laws passed by the various state legislatures under constitutional provisions similar to that contained in the Alaska Organic Act and many hundreds of acts passed by the Alaska legislature where this constitutional provision has not been literally complied with, that is to say, where the bill has not been read in full three times. At least one would gain that impression from reading the journal.

If the court should now hold that this provision of the Organic Act must be taken literally and that each bill must be read three separate times in full in order

to be valid it would nullify nearly every act of the legislature which has been passed from 1913 to date. There are hundreds of cases holding that readings by title the third time is a sufficient compliance with the constitutional provision that all bills must be read three times. This same house journal discloses a number of other bills read by number on the third reading.

We think the holdings of the courts are uniformly in conformity with the decision of the Supreme Court of Michigan in the case of *People, ex rel, Hart v. McElroy* found in L.R.A., Volume 2, page 613 as follows:

“As to the reading of the bill and substitute twice by the titles and only once at length, it cannot be considered at this late day, a violation of Section 19, article 4, of the Constitution, which provides that “Every bill and joint resolution shall be read three times in each house before the final passage thereof. The legislative practice of reading the same twice by title and only once at length has been maintained too long in this State to be now overthrown by the courts. It would deprive us of all statutory law. The Constitution, in terms, does not direct that the reading shall be at length, and while such reading might be the better practice, we cannot hold that it is imperatively required that it should be so read more than once. This Act, as it passed, was read once in each House at length, as appears from the journals.”

In the case of *Central of Georgia Railway v. The State of Georgia*, 42 L.R.A. commencing at page 518 we find the following, quoting from another decision:

“We do not understand this to mean, (referring

to the constitutional requirement of three readings), that everything which is to become a law by the adoption of the bill must be read on three several days. Such a construction is not warranted by the language of the Constitution. Our legislative annals afford many instances of the adoption by one comprehensive enactment of large masses of law which were never read on three several days in both branches of the legislature."

It was held in the case of *Kentucky-Tennessee Light and Power Company v. City of Paris*, 48 F.(2d) 795, that an amendment of a statute upon the third reading, limiting its effect to classes of counties specified, did not render the statute unconstitutional as not read three times.

We submit that at the time this bill was up for discussion on March 22nd, 1947, after having been read twice as shown by the journal it was undoubtedly read many times in the reading and discussion of the numerous and sweeping amendments offered. These two readings, one of which occurred on that very day and the general discussion on the amendments indicated by the journal, surely must be held to have satisfied the requirements of the Organic Act requiring three readings. The amendments, which go, not only to Senate Bill 105, but to much of the original Unemployment Compensation law, and which were designed not only to make changes in the language of Senate Bill 105, but to make additions thereto, could not have been intelligibly read and discussed and voted upon without a full and complete reading of the whole of Senate Bill 105, section by section.

The only evidence to disprove the fact of a regular

reading, which the courts adopt under the enrolled bill doctrine, is this single journal entry made by the Clerk of the House to the effect that a motion had been made and passed to read the bill by number. We contend that the journal shows a reading in full despite the said journal entry.

VI.

The Appellee Had No "Interest" Sufficient to Give the Court Jurisdiction of This Action.

The courts have long been committed to the cardinal rule that a litigant who seeks to invoke the jurisdiction of the court must show that he has a justiciable interest. It is not enough that he allege an imaginary case or that an act of legislation is invalid. He must show that there is involved a controversy whereby he suffers or will suffer some direct injury to his person or property. In the instant case there is no controversy at all which affects the appellee.

It is alleged in paragraph I of the Amended Complaint (R. 11) that the appellee is a citizen and taxpayer of Alaska. This allegation was put in issue by the answer of the intervenors (R. 35).

At the trial, the appellee was not called as a witness and no testimony was given or adduced relative to his position as a litigant. It therefore is not proven that he is even a resident or a taxpayer and of course there is no proof that he is affected adversely or otherwise by the questioned statute.

In State of Minn. ex rel, Smith v. Havelund County Assessor, 223 Minn. 89, 25 N.W. (2d) 474, 174 A.L.R. 544, a taxpayer brought an action for himself and on

behalf of all other taxpayers alleging the unconstitutionality of a certain amendment to the tax law. It was admitted that the suit was brought specifically to test the validity of the act. The trial court sustained a demurrer and this action was by the Supreme Court sustained for the reason that the pleadings did **not** show that the relator was prejudiced or suffered any loss by that statute. That court, quoting from *Borchard, Declaratory Judgment*, page 548 A.L.R.:

“* * * The party who invokes the power (of the court) must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.” *Commonwealth of Massachusetts v. Melon*, 262 U. S. 417; See *State ex rel. Clinton Falls Nursery Co. v. County of Steele*, 181 Minn. 427; *Lyman v. Chase*, 178 Minn. 244, 6 Dunnell Dig. and Suppl. Sec. 893”

That court further stated:

“In the absence of a justiciable controversy no jurisdiction to declare a statute unconstitutional, by declaratory judgment or otherwise, is conferred by the mere fact that the question is of interest to taxpayers in general. *County Board of Education v. Borgen*, 192 Minn. 512, 257 N.W. 92.”

In the case of *Frothingham v. Mellon*, 262 U. S. 47, a taxpayer filed an action in a representative capacity for herself and other taxpayers. She challenged what was known as the Maternity Act, under which Congress provided relief assistance to states for maternal and infant care. The plaintiff did not allege any direct

violation of her individual rights. The case was dismissed. The Supreme Court stated at page 488:

“We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. *That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such act.* Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than a negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through the forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.” (Italics ours)

And in *Melton v. Railroad Commission of Texas*, 10 F. Supp. 984, the plaintiff sought to enjoin the en-

forcement of a statute of Texas, and certain orders issued by the defendant thereunder, upon the ground that the statute and orders were unconstitutional. The plaintiff had failed to comply with certain administrative regulations issued by the defendant and predicated his cause of action upon the general theory of unconstitutionality. He did not allege any invasions of his own personal property rights. In denying injunctive relief, the Federal district court of Texas adopted the following rule (page 985):

“In arguing the case to us, both plaintiff and defendants, we think, have taken much broader ground than they can stand on. Plaintiff seems to think that it is competent for him to complain generally of the acts of the Commission, and of regulations and statutes under which the Commission purports to act, *instead* of being confined to attacking the regulations in the particulars in which they touch him. His attack, in short searches the whole field to which the law and regulations apply, and points out possibilities, under the statutes and rules, of oppressive and arbitrary action causing injury to persons and to the industry. He brings the statutes and regulations in review from the standpoint of a general critical analysis instead of, as he is required to do to obtain relief, showing that where they pinch him they violate constitutional principles. This he may not do.”

Another analagous case is found in *Wallace, Secretary of Agriculture v. Ganley, et al.*, 95 F.(2d) 364. In this proceeding a number of dairy farmers in Maryland and Virginia sued to enjoin the enforcement of certain minimum price regulations issued by the

defendant as Secretary of Agriculture under the provisions of the Agricultural Adjustment Act of 1935. The plaintiffs in this case also failed to show any violation of personal rights and sought to sustain their action solely upon the theory of a representative action brought on behalf of a class of which they were members. The action was dismissed upon the basis of the foregoing rules, the court speaking as follows:

"It is a well-recognized principle of the law of pleading that every bill must contain in itself sufficient matters of fact, *per se*, to maintain the pleader's case. (Page 366)

"Where an attack was made upon the constitutionality of a state law, the court 'will not go into imaginary cases.' (Page 368)

"The judicial power does not extend to the determination of abstract questions. (Page 368)

"Claims based merely upon assumed potential invasions of rights are not enough to warrant judicial intervention; there must be threatened or actual impairment of rights." (Page 368)

Another case illustrating the application of the foregoing rules to "imaginary cases" is found in the case of *Hatch v. Reardon*, 204 U. S. 152. The petitioner had been convicted under a New York statute for failure to pay state stamp taxes upon the sale of certain stocks. In his appeal he attacked the constitutionality of the state law upon two grounds, one being that the act contravened the "commerce clause." The transaction upon which his conviction was obtained had occurred wholly within the State of New York and his argu-

ment, based upon the contravention of the "commerce clause," was based entirely upon hypothetical situations. In sustaining his conviction, the supreme court, speaking through Justice Holmes, said at page 160:

"The other ground of attack is that the act is an interference with commerce among the several states. Cases were imagined, which, it was said, would fall within the statute, and yet would be cases of such commerce; and it was argued that if the act embraced any such cases it was void as to them, and, if void as to them, void altogether, on a principle often stated.

"But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all."

In the case of *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, the court in passing upon the validity of a statute of the State of Michigan establishing and regulating certain passenger tariffs within the state, ruled against the contentions of the railway company by use of the following language at pages 344, 345:

“The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter was given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of the courts. It is legitimate only in the last resort, and as a necessity in the determination of *real, earnest and vital controversy between individuals*. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.” (See also *Muskrat v. U. S.*, 219 U. S. 346, and *Asplund v. Hannett*, 249 Pac. 1074) (Italics ours)

In the case at bar there is nothing before the court in any manner affecting the appellee different from any other citizen or resident. The question presented by the pleadings is purely political. It is alleged that the legislature passed an act irregularly. The judgment entered by the court, and the relief granted, does not change or alter, benefit or damage, or in any manner affect the appellee. There was no justiciable issue before the court.

CONCLUSION

For the foregoing reasons, appellants urge that the decree of the District Court should be reversed with directions to dismiss the proceedings.

Respectfully submitted,

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APPENDIX TO BRIEF

Page 843: Journal of the House.

SENATE BILL No. 105 was read the second time.

It was moved by Mr. McCutcheon, seconded by Miss Garnick, that the following amendments to SENATE BILL No. 105, offered by the Committee on Labor, Capital and Immigration, be adopted:

Delete Section 2(1)(6)(F) (From the U.C.C. Laws.)

Amend Subsection 2(g) "Employing Unit" means any individual or type of organization, including the Territory of Alaska, or any partnership, etc. (of the U.C.C. Law.)

Add Subsection 7(c)(2)(1). Notwithstanding any other provisions of this Act the Territorial Government shall, in lieu of contributions required of employers under this Act, pay into the fund an amount equivalent to the amount of benefits paid to individuals based on wages paid by the Territory. If benefits paid an individual are based on wages paid by both the Territory and one or more other employers, the amount payable by the Territory to the fund shall bear the same ratio to total benefits paid to the individual as the base-period wages paid to the individual by the Territory bear to the total amount of base-period wages paid to the individual by all his base-period employers.

The amount of payment required under this section shall be ascertained by the Commission quarterly and shall be paid from the general fund of the Territory, except as provided in the next sentence, at such time and in such manner, as the Commission may prescribe. If an individual was

paid benefits on the basis of wages paid by the Territory from a special administrative fund, the payment by the Territory into the unemployment compensation fund shall be made from such special administrative fund.

Page 844:

Subsection 3(d)(3). In addition to the benefits payable under Section 3 of this Act, each eligible individual who is unemployed in any week shall be paid with respect to such week a dependency allowance for each dependent relative residing in Alaska as follows:

For the first such dependent relative, five dollars (\$5.00);

For each additional dependent relative, two dollars (\$2.00);

Provided, however, that no eligible individual shall receive dependency allowances in excess of eleven dollars (\$11.00) for any one week of unemployment.

The dependent's allowance is not to be taken into consideration in calculating the claimant's total amount of benefits under Subsection 3(d)(1) hereof.

The provisions of this section shall apply only to benefit years established after June 30, 1947.

At the request of Mrs. Engstrom, and by unanimous consent of the House, the privilege of the floor was extended to Mr. Marshall Keep, attorney for the Unemployment Compensation Commission for the purpose of discussing the proposed amendment to SENATE BILL No. 105.

Thereupon the House recessed until 8:30 o'clock P.M.

AFTER RECESS

It was moved by Mr. Frank Johnson, seconded by Miss Garnick, that the House recess until 9:00 o'clock P.M.

The question being, "Shall the House recess?" the roll was called with the following result:

Yeas, 11:—Barnett, Engstrom, Garnick, Hope, F. Johnson, McCutcheon, Meath, Nolan, Ost, Pollard, Snider.

Page 845:

Nays, 11:—Almquist, D. Anderson, Edw. Anderson, Coble, Egan, Hoopes, M. Johnson, Joy, Laws, Vukovich, Mr. Speaker.

Absent, 2:—Huntley, Newell.

Motion failed, and so the House did not recess.

The question then being, "Shall the amendment be adopted?" the motion failed, and so the amendment was not adopted.

It was moved by Mr. McCutcheon, seconded by Miss Garnick, that the following amendment to SENATE BILL No. 105, offered by Mr. McCutcheon, be adopted:

AMENDMENT TO SENATE BILL 105

On page 1, line 14, after the letter "(d)" in parentheses, add a comma and the following: "Subsection 9(b), Section 10(a) 3, Section 10(b), Section 11(a)",

(AND)

On page 9, line 8, after "Section 3" strike all of the balance of line 8 and all of line 9 and insert in lieu thereof the following:

Subsection 9(b). "Accounts and Deposits". The Commission shall designate a treasurer and cus-

todian of the Unemployment Compensation Fund (THE TERRITORIAL TREASURER SHALL BE EX-OFFICIO THE TREASURER AND CUSTODIAN OF THE FUND AND) who shall administer such fund in accordance with the directions of the Commission and shall issue warrants upon it in accordance with such regulations as the Commission shall prescribe. He shall maintain within the Fund three accounts:

- (1) a clearing account,
- (2) an Unemployment Trust Fund account, and
- (3) a benefit account.

All moneys payable to the Fund, upon receipt thereof by the Commission, shall be forwarded to the . . .

Page 846:

Treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to Section 14 and 2(i)(6)(E) of this Act may be paid from the clearing account upon warrants issued by the Treasurer under the direction of the Commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of the Treasury of the United State of America to the credit of the account of this Territory in the Unemployment Trust Fund, established and maintained pursuant to Section 904 of the Social Security Act, as amended, any provision of law in this Territory relating to the deposit, administration, release or disbursement of moneys in the possession or custody of this Territory to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this Territory's account in the Unemployment Trust Fund. Except as herein otherwise provided, moneys in

the clearing and benefit accounts may be deposited by the Treasurer, under the direction of the Commission, in any bank or public depository in which general funds of the Territory may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. Moneys in the clearing and benefit accounts shall not be commingled with other Territorial funds, but shall be maintained in separate accounts on the books of the depository bank. Such money shall be secured by the Depository law of this Territory; and collateral pledged for this purpose shall be kept separate and distinct from any collateral pledged to secure other funds of the Territory. The Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the fund. All sums recovered for losses sustained by the fund shall be deposited therein. The treasurer shall give bond conditioned upon the faithful performance of his duties as treasurer of the fund in a form prescribed by statute or approved by the Attorney General, and in an amount approved by the Commission. All premiums upon bonds required pursuant to this Section, when furnished by an authorized surety company or by a duly constituted governmental bonding firm, shall be paid from the Unemployment Administration Fund.

Page 847:

On page 9, line 8, strike Sec. 3, insert the following:

Section 4. Subsection 10(a)(3). The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be (Five Thousand Two Hundred and Fifty Dollars (\$5,250.00) Per Annum) fixed by the Commission, payable in equal monthly in-

stallments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be appointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.

On page 9, after Section 4, insert the following:

Section 5. Section 10(b) Compensation of Commissioners. One of the members of the Commission so appointed shall be chairman of the Commission. The members of the Commission shall not receive any fixed salary but shall be paid at the rate of (Ten Dollars) (\$10.00) fifteen dollars (\$15.00) per day plus necessary expenses while engaged in the actual performance of their duties, but no commissioner shall in any event receive more than One Thousand Dollars (\$1,000.00) salary in addition to expenses for any calendar year. The salaries of all commissioners shall be paid from the unemployment compensation administration fund. The chairman of the Commission shall be designated by the Governor.

On page 9, after Section 5, insert the following:

Section 6. Section 11(a)—“Duties and Powers of Commission.” It shall be the duty of the Commission to administer this Act; and it shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable

to that end. Such rules and regulations shall be effective upon publication in . . .

Page 848:

the manner not inconsistent with the provisions of this Act, which the Commission shall prescribe. The Commission shall determine its own organization and methods of procedure in accordance with the provisions of this Act, and shall have an official seal which shall be judicially noticed. Not later than the thirty-first day of January of each year, the Commission shall submit to the Governor and the Legislature a report covering the administration and operation of this Act during the preceding twelve months and shall make such recommendations for amendments to this Act as the Commission deems proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the Commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period.

On page 9, after Section 6, insert the following:

Section 7. Effective date. This Act shall become effective June 30th, 1947.

The question then being, "Shall the amendment be adopted?" the roll was called with the following result:

Yeas, 9:—Almquist, Edw. Anderson, Barnett, Garnick, Hope, F. Johnson, McCutcheon, Ost, Pollard.

Nays, 13:—D. Anderson, Coble, Egan, Engstrom,
Hoopes, M. Johnson, Joy, Laws, Meath,
Nolan, Snider, Vukovich, Mr. Speaker.
Absent, 2:—Huntley, Newell.

Motion failed and so the amendment was not adopted.

It was moved by Mrs. Engstrom, seconded by Mr. D. Anderson, that the Rules be suspended as to SENATE BILL NO. 105, that it be considered re-engrossed, advanced . . .

Page 849:

to third reading, read by number only and placed in final passage.

Thereupon Mr. McCutcheon demanded a Call of the House.

It was moved by Mr. Hoopes, seconded by Mr. Coble, that the Rules be suspended and that the proceedings on the Call of the House be dispensed with.

Thereupon Mr. McCutcheon demanded a Call of the House on that motion. The Speaker ordered the Sergeant-at-Arms to bring before the bar of the House the absent Representatives, Mr. Huntley and Mr. Newell.

Thereupon the Speaker declared the House at recess until the arrival of Messrs. Huntley and Newell.

AFTER RECESS

Pursant to recess the House was called to order at 10:30 o'clock P.M.

The question being, "Shall the Rules be suspended as to SENATE BILL NO. 105?" the roll was called with the following result:

Yeas, 16:—D. Anderson, Edw. Anderson, Coble, Egan, Engstrom, Hoopes, M. Johnson, Joy, Laws, Meath, Newell, Nolan, Ost, Snider, Vukovich, Mr. Speaker.

Nays, 8:—Almquist, Barnett, Garnick, Hope, Huntley, McCutcheon, F. Johnson, Pollard.

Motion carried and SENATE BILL NO. 105 was read the third time by number only.

The question being, "Shall the Bill Pass?" the roll was called with the following result:

Page 850:

Yeas, 17:—D. Anderson, Edw. Anderson, Barnett, Coble, Egan, Engstrom, Hoopes, M. Johnson, Joy, Laws, Meath, Newell, Nolan, Ost, Snider, Vukovich, Mr. Speaker.

Nays, 7:—Almquist, Garnick, Hope, Huntley, F. Johnson, McCutcheon, Pollard.

And so the Bill passed.

The Speaker announced that he had signed SENATE BILL No. 105 and ordered the same returned to the Senate.

RULES OF THE HOUSE

Page 1033:

RULE 54. Each amendment made by a committee to a bill shall be in writing on a separate slip of paper, and shall be securely attached to the original bill by a paper fastener. The report of the committee shall also contain a statement of the amendments agreed to by the committee. Any committee report on a bill not conforming with this rule shall be returned by the Chief Clerk of the House to the committee for compliance

with this rule without further order by the House. Upon second reading, the bill shall be read section by section in full, and be subject to amendment. No amendment shall be considered by the House until it shall have been sent to the desk in writing and read by the Clerk. All amendments adopted on the second reading shall be securely attached to the original bill by a paper fastener.

Amendments rejected by the House shall be passed to the Minute Clerk, and the Journal shall show the disposition of such amendments.

No. 12098

United States
Court of Appeals
for the Ninth Circuit

FELICE DI PROSPERO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED
JAN 12 1949



No. 12098

United States
Court of Appeals
for the Ninth Circuit

FELICE DI PROSPERO,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

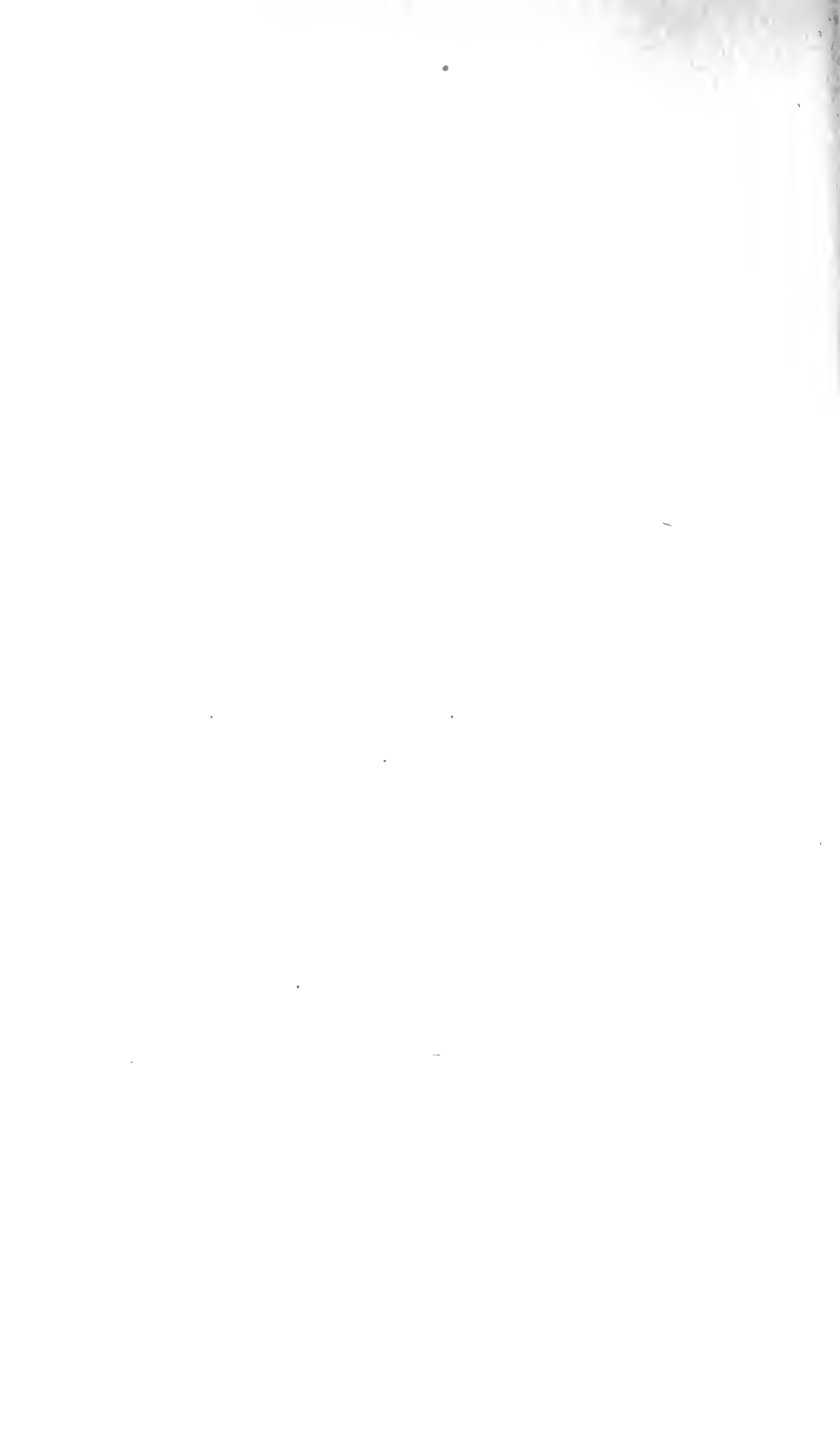
Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

HENRY J. ROGERS, Esq.,

For Respondent:

R. C. WHITLEY, Esq.

Docket No. 17821

FELICE DI PROSPERO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1948

Apr. 9—Petition received and filed. Taxpayer notified. Fee not paid.

Apr. 14—Fee paid—check.

Apr. 15—Copy of petition served on General Counsel.

May 6—Entry of appearance of Henry J. Rogers, as counsel filed.

June 2—Motion to dismiss for lack of jurisdiction filed by General Counsel.

June 4—Hearing set July 7, 1948 on respondent's motion.

1948

July 7—Hearing had before Judge Turner on respondent's motion. Motion granted. Proceeding dismissed for lack of jurisdiction.

July 8—Order of dismissal entered. Judge Turner, Division 8.

Sept. 30—Petition for review by U. S. Court of Appeals for the 9th Circuit filed by taxpayer. 11/4/48 Acceptance of service of petition for review acknowledged thereon.

Oct. 25—Designation of record filed by taxpayer. 11/4/48 Acceptance of service of designation acknowledged thereon. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

The Tax Court of the United States

Docket No. 17821

FELICE DI PROSPERO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Income tax Division, Room 623, Serial No. Sr:AT:SvJ) dated January 9, 1948, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at 3191 Washington Street, San Francisco, California. The return for the period here involved was filed with the collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on January 9, 1948.

3. The taxes in controversy are income taxes for the calendar years 1942 to 1945 inclusive and in the amount of \$1,945.61, including penalty in the amount of \$648.53. [2]

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Assets, December 31, 1941, are deficient in the amount of \$500.00;

(b) Liabilities, December 31, 1945, are deficient in the amount of \$999.02;

(c) Living Expenses, 1942 to 1945, are over-estimated by the collector, in the amount of \$1,600.00.

5. The facts upon which the petitioner relies as the basis of this proceeding, are as follows:

A. The items described below have been set forth in affidavits, dated September 16, 1946, and said affidavits, were presented to the collector, who disallowed same:

(a) Furniture purchases in the amount of \$500 was omitted, through no fault of the petitioner, from the assets in 1941, thereby increasing the net worth \$500 as of December 31, 1941.

(b) The 1945 income tax in the amount of \$793.50 was omitted from the liabilities; also, property tax in the amount of \$205.52 for the year 1945, was omitted from the liabilities as of December 31, 1945. [3]

(c) The living expenses for the four year period should be \$2,400, and not \$4,000, as estimated by the collector.

(d) The addition for taxes paid for the year 1945 should be reduced by \$793.50 as this portion of the tax was not paid until the year 1946.

B. As a result of the above errors,

(1) The increase in net worth from December 31, 1941, to December 31, 1945, should be reduced by \$1,499.02;

(2) The addition for living expenses and taxes paid should be reduced by \$2,393.50.

Wherefore, the Petitioner prays that this Court may hear the proceeding and reduce the tax deficiency by \$1,527.81, to \$417.80.

/s/ FELICE DI PROSPERO,

/s/ H. J. ROGERS,

Attorney for Petitioner. [4]

State of California,

City and County of San Francisco—ss.

Felice Di Prospero, being duly sworn, says that he is the petitioner above-named; that he has read the fore-going petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ FELICE DI PROSPERO.

Subscribed and sworn to before me this 6th day of April, 1948.

/s/ AGNES M. COLE,

Notary Public in and for the City and County of
San Francisco, State of California. [5]

EXHIBIT "A"

Treasury Department
Internal Revenue Service
100 McAllister Street Building
San Francisco 2, Calif.

January 9, 1948.

Office of the Collector First District of California

In Replying Refer To

Income Tax Division
Audit Section Room 623
Serial No. SR:AT:SvJ

Felice Di Prospero
3191 Washington St.
San Francisco, Calif.

You are advised that the determination of your income tax liability for the taxable years 1942, (\$8.62); 1943, (\$229.65); 1944, (\$279.00) and 1945, (\$1,428.34) amounting to a total deficiency of \$1,945.61 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) from the date of mailing of this letter, you may file a petition with the Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to the Collector of Internal Revenue, 100 McAllister Street, San Francisco 2, California, for the attention of Audit Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GEORGE J. SCHOENEMAN,
Commissioner.

By JAMES G. SMYTH,
Collector of Internal Revenue.

Enclosures: Statement Form Waiver.

[Endorsed]: T.C.U.S. Filed April 9, 1948. [6]

The Tax Court of the United States
Washington

Docket No. 17821

FELICE DI PROSPERO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER OF DISMISSAL

This proceeding came on for hearing July 7, 1948, at Washington, D. C., pursuant to notice,

upon a motion to dismiss filed by the respondent. It appearing from the evidence submitted and from the record presented that the petition for redetermination was not filed with the Court within the 90 days provided by the Revenue Act of 1926, as amended by section 501 of the Revenue Act of 1934, it is

Ordered that the respondent's motion is granted and the proceeding is dismissed for lack of jurisdiction.

/s/ BOLON B. TURNER,
Judge.

Entered July 8. 1948.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Felice Di Prospero, petitioner, hereby files petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the order of dismissal of the Tax Court of the United States, dated July 7, 1948, Docket No. 17821, copy of which hereto attached.

1. The petitioner is an individual with residence at 3191 Washington Street, San Francisco, California. The jurisdiction of this Court is invoked under section 1141 of the Internal Revenue Code.

2. My petition to the Tax Court of the United States was attempted to be delivered for filing within the 90 days as provided by the Revenue Act of 1926 and Section 501 of 1934, but the Tax

Court was found closed on the ninetieth day, at the time when the petition was delivered for filing, as evidenced by letter from the United States Post Office, Washington, D. C., dated July 9, 1948, photostatic copy of which, herewith enclosed and marked Exhibit A.

3. Exhibit "B", copy of letter of the Treasury Department Internal Revenue Service, dated January 9, 1948, copy of which herewith enclosed and marked Exhibit "B", in paragraph No. 3, states that within 90 days (not counting Saturdays, Sunday or [8] legal holidays in the District of Columbia as the 90th day) from date of mailing of that letter, petition could be filed. No limitation of time or hours within which to file the petition on the 90th day was mentioned; therefore, the petition for re-determination of the deficiency was first delivered for filing on the ninetieth day.

Wherefore, the petitioner prays for a review of the Order of Dismissal.

/s/ FELICE DI PROSPERO.

Enclosed: Copy order of dismissal, letter U. S. Post Office (Exhibit "A"), copy letter Internal Revenue (Exhibit "B"). [9]

State of California,
City and County of San Francisco—ss.

Felice Di Prospero, being duly sworn, says that he is the petitioner above-named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained

therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ FELICE DI PROSPERO.

Subscribed and sworn to before me this 28th day of September, 1948.

(Seal) /s/ NANCY EVERETT,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Nov. 3, 1950.

Receipt of a copy of the within Petition for Review is hereby admitted this Fourth day of November, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue.

[Title of Tax Court and Cause.]

ORDER OF DISMISSAL

This proceeding came on for hearing July 7, 1948, at Washington, D. C., pursuant to notice, upon a motion to dismiss filed by the respondent. It appearing from the evidence submitted and from the record presented that the petition for re-determination was not filed with the Court within the 90 days provided by the Revenue Act of 1926, as amended by section 501 of the Revenue Act of 1934, it is

Ordered that the respondent's motion is granted and the proceeding is dismissed for lack of jurisdiction.

/s/ BOLON B. TURNER,

Judge.

[11]

EXHIBIT "A"

United States Post Office

Washington 13, D. C.

Mr. Henry J. Rogers, Atty. at Law,
111 Sutter Street,
San Francisco 4, Calif.

In reply refer to RD-s, Telephone Sterling
5100, Extension 368.

My dear Sir:

Reference is made to your letter of June 29, 1948, relative to delivery of air mail, special delivery, registered article No. 756231, mailed by you April 6, 1948, addressed to the Tax Court of the U. S., Clerks Office, Washington, D. C.

Insofar as can be ascertained the above article was received in this office around 2:45 p.m., April 8, 1948, and left the office by Special Delivery Messenger at 4:45 p.m. that day for delivery to addressee. When the Messenger arrived at the address of the Tax Court with the article, he found the office closed.

The register was delivered the next morning,

being signed for by the authorized agent of the addressee at 8:00 a.m., April 9, 1948.

Very truly yours,

/s/,

Acting Postmaster.

[12]

EXHIBIT "B"

Treasury Department
Internal Revenue Service
100 McAllister Street Building
San Francisco 2, California

January 9, 1948

Office of the Collector First District of California.

In Replying Refer to

Income Tax Division
Audit Section Room 623
Serial No. SR:AT:SvJ

Felice Di Prospero
3191 Washington St.
San Francisco, Calif.

You are advised that the determination of your income tax liability for the taxable years 1942, (\$8.62); 1943, (\$229.65); 1944, (\$279.00) and 1945, (\$1,528.34) amounting to a total deficiency of \$1,945.61 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Saturday, Sun-

day or legal holiday in the District of Columbia as the ninetieth day) from the date of mailing of this letter, you may file a petition with the Tax Court of the United States for a redetermination of a deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Collector of Internal Revenue, 100 McAllister Street, San Francisco 2, California, for the attention of Audit Section. The signing and filing of this will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GEORGE J. SCHOENEMAN,
Commissioner.

By JAMES G. SMYTH,
Collector of Internal Revenue.

Enclosures: Statement Form Waiver.

[Endorsed]: Filed Sept. 30, 1948.

[13]

[Title of Tax Court and Cause.]

DESIGNATION OF ENTIRE RECORD, PROCEEDINGS AND EVIDENCE TO BE TRANSMITTED TO THE CIRCUIT COURT OF APPEALS

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled proceeding in connection with the Petition for Review by the Circuit Court of Appeals for the Ninth Circuit, heretofore filed by Felice Di Prospero:

1. Docket entries of all proceedings before the Tax Court.

2. Pleadings before the Tax Court:

(a) Original petition, delivered for filing 8 April, 1948. (Filed 9 April, 1948.)

(b) Order of dismissal, 7 July, 1948.

3. Petition for Review, together with proof of service of notice of filing, and of service of a copy, of Petition for Review, and Exhibit "A" (letter U. S. Post Office), and Exhibit "B" (letter Internal Revenue).

4. This designation of entire record, proceedings and evidence to be contained in the printed record on review.

Said transcript to be prepared, certified and transmitted, as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ FELICE DI PROSPERO,
Petitioner on Review.

Acknowledged before me this 21st day of October, 1948.

(Seal) /s/ CATHERINE E. KEITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Dec. 16, 1950.

Receipt of a copy of the within designation is hereby admitted this Fourth day of November, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Oct. 25, 1948. [14]

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 14, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of November, 1948.

(Seal) /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 12098. United States Court of Appeals for the Ninth Circuit. Felice Di Prospero, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed November 22, 1948.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

Docket No. 12098

FELICE DI PROSPERO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION FOR EXTENSION OF TIME FOR
TRANSMITTING RECORD ON REVIEW

Whereas, the petitioner on review on September 30, 1948, filed its petition for review from a decision of The Tax Court of the United States and notice thereof and the time for transmitting the record on review will expire, under Rule 30, on November 8, 1948, and

Whereas, petitioner on review has submitted a narrative statement of evidence to counsel for respondent and said statement has not been settled, and therefore the record on review cannot be completed and transmitted to this Honorable Court within the time allowed because of conditions beyond the control of petitioner, and additional time is required to complete file and transmit the record to this Honorable Court.

Now, Therefore, the petitioner for review respectfully moves that the time within which to

complete and transmit the record on review in this proceeding be extended to and including December 15, 1948.

/s/ FELICE DI PROSPERO,
Petitioner on Review.

So Ordered: Time extended to Dec. 1, 1948.

/s/ WILLIAM DENMAN,
Chief Judge, U. S. Court of Appeals for the Ninth
Circuit.

State of California,
City and County of San Francisco—ss.

Felice Di Prospero, being first duly sworn, deposes and says:

That he is the true petitioner on review as filed with the U. S. Tax Court on September 30, 1948.

That he filed with the U. S. Tax Court a designation of entire record, proceedings and evidence to be transmitted to this Honorable United States Court of Appeals for the Ninth District.

That he served copies of petition for review and copies of designation of entire record, proceedings and evidence on Charles Oliphant, Counsel for Respondent on Review, on Theron L. Caudle, Assistant Attorney General, and on the Commissioner of Internal Revenue.

/s/ FELICE DI PROSPERO,
Petitioner on Review.

Subscribed and sworn to before me this day of November 5, 1948.

(Seal) /s/ NANCY EVERETT,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Nov. 3, 1950.

[Endorsed]: Filed November 6, 1948. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS

Herewith, Felice Di Prospero, Petitioner, intends to rely on the following points:

1. The Tax Court erred in dismissing for lack of jurisdiction original petition dated 6 April 1948, Docket No. 17821, in which above-named petitioner prayed to the Honorable Tax Court to hear proceedings and reduce tax deficiency for the years 1941 to 1945, inclusive, as determined by the Commissioner of Internal Revenue in letter dated 9 January 1948, insofar as petition was attempted to be delivered for filing within the 90 days, but the Tax Court was found closed on the ninetieth day, at the time when the petition was attempted to be delivered, as evidenced by letter from the United States Post Office, Washington, D. C., dated 9 July 1948.

/s/ FELICE DI PROSPERO.

Subscribed and sworn to before me this 29th day of November, 1948.

(Seal) /s/ CATHERINE E. KEITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 16, 1950.

[Endorsed]: Filed November 29, 1948. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF ENTIRE
RECORDS TO BE PRINTED

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Felice Di Prospero, the Petitioner on Review herein, pursuant to its Petition for Review of the decision of the Tax Court of the United States entered 7 July 1948, Docket No. 17821, designates the entire transcript for printing.

/s/ FELICE DI PROSPERO.

Subscribed and sworn to before me this 29th day of November, 1948.

(Seal) /s/ CATHERINE E. KEITH,
Notary Public in and for the City and County of San
Francisco, State of California.

My commission expires December 16, 1950.

[Endorsed]: Filed November 29, 1948. Paul P.
O'Brien, Clerk.

No. 12,098

IN THE

United States Court of Appeals
For the Ninth Circuit

FELICE DI PROSPERO,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

FELICE DI PROSPERO,

3191 Washington Street, San Francisco 15,

Petitioner in Propria Persona.

FILED

CB - 1949

L. P. O'BRIEN,
CLERK

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No. 12,098

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FELICE DI PROSPERO,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

JURISDICTION.

Felice Di Prospero, petitioner, seeks a recomputation of income tax deficiencies, determined by respondent for the taxable years 1942, 1943, 1944, and 1945, inclusive, for deficiencies in the amount of \$1,945.61, including penalty in the amount of \$648.53 (Tr. 6 and 12). From a decision of the United States Tax Court, hereinafter referred to as Tax Court, entered July 8, 1948, dismissing original petition for review by this Court, on September 28, 1948 (Tr. 8), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code, 26 U.S.C.A., Sections 1141 and 1142.

STATEMENT OF FACTS AND QUESTION INVOLVED.

A. The facts herein involved may be summarized as follows:

(a) Petition for redetermination of income tax deficiency as mailed by attorney for petitioner by air-mail, special delivery, registered letter No. 756231 on April 6, 1948, addressed to The Tax Court of the United States, Clerk's Office, Washington, D.C. (Tr. 11).

(b) Above-mentioned petition was attempted to be delivered for filing within the ninety days, as specified by the respondent's letter dated January 9, 1948 (Tr. 6) and as provided by *Sec. 272, Internal Revenue Code (as Amended by Sec. 168(a), Rev. Act 1942)*, but the Tax Court was found closed on the ninetieth day at the time when the petition was attempted to be delivered as evidenced by letter from the United States Post Office, Washington, D.C. (Tr. 11).

(c) The Tax Court, through no fault of petitioner, was unaware of the fact that petition had been offered for filing on the ninetieth day, since the office was closed.

B. The question involved on this review is:

(a) Whether a petition, offered for filing within the ninety days, but filed by the Clerk of the Tax Court on the following day because the office of the Clerk was closed on the ninetieth day at the time petition was offered for filing, is within the jurisdiction of the Tax Court.

SPECIFICATION OF ERROR.

(1) The Tax Court erred in dismissing original petition for lack of jurisdiction (Tr. 7 and 8).

STATUTES AND REGULATIONS INVOLVED.

Internal Revenue Code (1941):

“Sec. 272 Procedure in General (As Amended by Sec. 168(a), Rev. Act 1942).

(a) (1) Petition to Board of Tax Appeals.— If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals. * * *”

SUMMARY OF ARGUMENT.

A. A day is twenty-four hours, beginning at midnight and ending the next midnight.

B. The ninetieth day ended at midnight.

C. The petitioner had the whole of the ninetieth day on which to perform and file the petition.

D. The Tax Court was closed before the end of the ninetieth day.

E. The Tax Court had jurisdiction in this case.

ARGUMENT.

A.

(1) A day is intended as an ordinary day of twenty-four hours, from one midnight to the next midnight. Had a shorter period been contemplated, or a day other than an ordinary day intended, other and different language would have been employed by respondent to express that intention in his letter dated January 9, 1948 (Tr. 12), in which respondent states, in paragraph No. 3, "within ninety days (not counting Saturday, Sunday or legal holiday in the District of Columbia as the ninetieth day) * * *"

(a) As in the case of *Helphenstine v. The Vincennes National Bank, et al.*, 65 S.C. Indiana 589, that Court defines day as:

"a day in its legal as well as in its plain or ordinary and usual sense, means a period of time consisting of twenty-four hours, and including the solar day and the night. Co. Lit. 135, a; Bracton (folio) 264'".

(2) Therefore, respondent intended an ordinary day as the ninetieth day.

B.

(1) Petition for redetermination of income tax deficiency was mailed by attorney for petitioner via air-mail, special delivery, registered letter No. 756231, on April 6, 1948, addressed to the Tax Court of the United States, Clerk's Office, Washington, D.C. (Tr. 11).

Above mentioned registered letter was received in the Post Office in Washington, D.C., around 2:45 p.m., April 8, 1948, and left that Post Office by special delivery messenger at 4:45 p.m. that day, for delivery to addressee. When the messenger arrived at the address of the Tax Court with the registered letter, on the ninetieth day, as provided by Sec. 272, Internal Revenue Code (as amended by Sec. 168(a), Rev. Act 1942), he found the office closed, as evidenced by letter from the United States Post Office, Washington, D.C. (Tr. 11).

(2) The Tax Court, through no fault of petitioner, was unaware of the fact that petition had been offered for filing on the ninetieth day, since the office of the Tax Court was closed.

(3) Therefore, original petition was offered for filing within the ninety days, as in the case of *John Zimmerman v. Augustus W. Cowan*, 107 S.C. Ill. 631, that Court gives an opinion of what constitutes a day as being:

“where a person is required to take action within a given number of days, in order to secure or assert a right, the day is to consist of twenty-four hours, that is the popular, and the legal, sense of the term”.

As in the case of *The People v. Hatch*, 33 S.C. Ill. 138, that Court grants that:

“so when an act is to be performed on a particular day, the party has the whole of that day on which to perform it”.

As in the case of the *District Court of the United States for the District of Vermont, in the matter of Delvis Welman*, 20 D.C. Vt. 653, that Court states that:

“although divisions of a day are allowed to make priorities in questions concerning private acts and transactions, they are never allowed to make priorities in questions concerning public acts, such as legislative acts, or public laws, or such judicial proceedings, as are matters of record”.

CONCLUSION.

Being that the petition for income tax redetermination was offered for filing before the end of the ninetieth day, the Tax Court had jurisdiction on this matter. Wherefore, I pray that this Court may hear my proceedings and reverse the decision of the Tax Court.

Dated, San Francisco,
February 2, 1949.

Respectfully submitted,

FELICE DI PROSPERO,

Petitioner in Propria Persona.

No. 12,098

In the United States Court of Appeals
for the Ninth Circuit

FELICE DI PROSPERO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
HELEN GOODNER,
VIRGINIA H. ADAMS,

Special Assistants to the Attorney General.

FILED

MAR 11 1949

PAUL P. O'BRIEN,
CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,098

FELICE DI PROSPERO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Tax Court rendered no opinion.

JURISDICTION

The petition for review (R. 8-9) involves federal income taxes for the years 1942, 1943, 1944 and 1945. On January 9, 1948, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of \$1,945.61. (R. 6-7, 12-13.) On April 9, 1948, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency. (R. 3-7.) Pursuant to motion, the Tax Court on July 8, 1948, entered an order dismissing for lack of jurisdiction. (R. 2, 10-11.) The case is brought to this Court by a petition for review filed September 30, 1948 (R. 8-10), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Did the Tax Court properly dismiss for lack of jurisdiction where the petition for redetermination was not filed with it within ninety days after the mailing of the deficiency notice, as provided in Section 272(a) of the Internal Revenue Code, but where an attempt was made to deliver the petition after the closing hour of the Tax Court on the ninetieth day?

STATUTE AND RULE INVOLVED

Internal Revenue Code:

SEC. 272 [As amended by Section 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669, and Section 504 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. PROCEDURE IN GENERAL.

(a) (1) *Petition to Tax Court*.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. * * *

* * * * *

(c) *Failure to File Petition*.—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

* * * * *

(26 U.S.C. 1946 ed., Sec. 272.)

SEC. 1111 [As amended by Section 504 of the Revenue Act of 1942, *supra*]. RULES OF PRACTICE, PROCEDURE, AND EVIDENCE.

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rule of evidence applicable in the courts of the District of Columbia in the type of proceedings which prior to September 16, 1938, were within the jurisdiction of the courts of equity of said District.

(26 U.S.C. 1946 ed., Sec. 1111.)

Rules of Practice before the Tax Court of the United States (revised to November 3, 1947) :

RULE 1.—BUSINESS HOURS

The office of the clerk of the Court at Washington, D. C., shall be open during business hours on all days, except Saturdays, Sundays, and legal holidays, for the purpose of receiving petitions, pleadings, motions, and the like. "Business hours" are from 8:45 o'clock a.m. to 5:15 o'clock p.m.

RULE 9.—FILING

Any document to be filed with the Court, must be filed in the office of the clerk of the Court in Washington, D. C., during business hours (see Rule 1) ;
* * *

STATEMENT

The notice of deficiency was mailed to the taxpayer on January 9, 1948. (R. 3, 6-7, 12-13.) The ninetieth day after the notice was mailed, and the last day on which the petition could be filed, was April 8, 1948. The petition was received and filed by the Tax Court on April 9, 1948. (R. 1.) On April 6, 1948, taxpayer's counsel mailed from San Francisco, by special delivery, air mail, registered article No. 756231, addressed to the Tax Court of the United States, Clerk's Office, Washington, D. C. (R. 11.) A letter from the Post Office Department (R. 11) stated that, insofar as could

be ascertained, the article was received in the United States Post Office, Washington 13, D. C., at approximately 2:45 p.m., April 8, 1948, and left the Post Office by special delivery messenger at 4:45 p.m. that day for delivery to addressee. When the messenger arrived at the address of the Tax Court with the article he found the office closed. The register was delivered the next morning, April 9, 1948. (R. 11-12.)

The Commissioner filed a motion to dismiss for lack of jurisdiction (R. 1, 8, 10) on the ground that the petition for redetermination was not filed within the ninety-day statutory period (R. 8, 10), and on July 8, 1948, the Tax Court entered an order dismissing the proceeding for lack of jurisdiction (R. 7-8, 10-11). From that order, the taxpayer petitioned this Court for review. (R. 8-10)

SUMMARY OF ARGUMENT

The statute conferring jurisdiction provides that a petition for redetermination shall be filed with the Tax Court within ninety days after the Commissioner has mailed the deficiency notice. The Tax Court rules provide that documents shall be filed during business hours, and that business hours are from 8:45 a.m. to 5:15 p.m. These rules, having been promulgated under the authority of Section 1111 of the Internal Revenue Code, have the force of law. The attempt to deliver the petition to the Tax Court after 5:15 p.m. on the last day did not constitute a filing, and the petition therefore was not filed within the ninety-day statutory period. The appeal period, being mandatory and jurisdictional, cannot be altered, enlarged or extended, and the Tax Court properly dismissed the proceeding.

ARGUMENT

The Tax Court Properly Dismissed for Lack of Jurisdiction

Section 272(a) of the Internal Revenue Code, *supra*, requires that petitions for redetermination must be filed

within ninety days after the mailing of the deficiency notice. The rules of the Tax Court provide that documents must be filed with the court during business hours, which are from 8:45 a.m. to 5:15 p.m. These rules, having been promulgated under Section 1111 of the Internal Revenue Code, *supra*, have the force of law. *Edward Barron Estate Co. v. Commissioner*, 93 F. 2d 751 (C.A. 9th); *Lewis-Hall Iron Works v. Blair*, 23 F. 2d 974 (C.A. D.C.), certiorari denied, 277 U. S. 592; *Goldsmith v. Board of Tax Appeals*, 4 F. 2d 422 (C.A. D.C.).

To constitute a filing under the statute and rules, therefore taxpayer's petition must have been delivered to the proper official of the Tax Court prior to 5:15 p.m. on the ninetieth day. *Edward Barron Estate Co. v. Commissioner, supra*; *Lewis-Hall Iron Works v. Blair, supra*; *Poynor v. Commissioner*, 81 F. 2d 521 (C.A. 5th).¹ In the instant case this was not done; the petition was actually filed in the Tax Court on April 9, 1948 (R. 1), the ninety-first day after the mailing of the deficiency notice. To be sure, a registered article, which it is assumed contained the petition although the record does not show that it did, was brought to the Tax Court after closing hours on the ninetieth day. Upon finding the court closed, the special delivery messenger returned the article to the post office, and the article was delivered and signed for the next morning—the ninety-first day after the mailing of the deficiency notice.

¹ The generally accepted definition of "file", both as used in the statutes and in ordinary usage, conforms to the interpretation given by the above-stated authorities; that is, the delivery of the papers in question to the proper officer, and by him received to be kept on file. *United States v. Hardy*, 74 F. 2d 841 (C.A. 4th); *In re Gubelman*, 10 F. 2d 926, 929 (C.A. 2d), reversed in part on other grounds *sub nom. Latzko v. Equitable Trust Co.*, 275 U.S. 254; *Laser Grain Co. v. United States*, 250 Fed. 826, 831 (C.A. 8th); *Emmons v. Marbelite Plaster Co.*, 193 Fed. 181, 183 (C.C. Nev.); *Stone v. Crow*, 2 S.D. 525; *Gallagher v. Linwood*, 30 N.M. 211; *Hoyt v. Stark*, 134 Cal. 178; *Wescott v. Eccles*, 3 Utah 258; *Conant's Estate*, 43 Ore. 530, 534.

These facts do not show a filing on the ninetieth day, as a filing was defined in the foregoing cases. Indeed, in *Stebbins' Estate v. Helvering*, 121 F. 2d 892 (C.A. D.C.), the court stated that a petition, in order to be filed, must be delivered to a proper officer of the Board to be filed before the close of business of the final day permitted in the statute. Again, in *Lewis-Hall Iron Works v. Blair*, *supra*, the Court of Appeals sustained the Tax Court's dismissal where the petition for redetermination had been left at the Tax Court by a post office messenger after the closing hour of the court on the last day for the filing of the petition.

In the light of the rules of the court and the existing authorities, it is manifest that the petition was not filed within the ninety-day statutory period, and that the Tax Court therefore had no jurisdiction. It has been consistently held that the time limitation for filing of the petition is statutory and jurisdictional. A strict compliance with the terms of the statute is therefore essential, and no equitable considerations may operate to alter those terms. *Edward Barron Estate Co. v. Commissioner*, *supra*; *Poynor v. Commissioner*, *supra*; *Chambers v. Lucas*, 41 F. 2d 299 (C.A. D.C.); *Lewis-Hall Iron Works v. Blair*, *supra*; *Stebbins' Estate v. Helvering*, *supra*.

None of the cases cited by taxpayer involves Section 272(a) of the Internal Revenue Code, nor do the cases relied upon support his position. In *Zimmermann v. Cowan*, 107 Ill. 631, the law required the clerk's office to remain open for business until 6:00 p.m. Appellant delivered a petition after six o'clock on the last day allowed, and the petition was held to have been timely filed. The court stated that the requirement that the office of the clerk be kept open until six o'clock was not understood to hinder the clerks from transacting business after that time if they wished. But, unlike the in-

stant case, there the petition was actually delivered and accepted by the clerk, not merely presented to a closed office, and there no rule required that petitions be filed during business hours. In *Helphenstine v. Vincennes National Bank*, 65 Ind. 583, the question involved was the applicability of the ancient law providing that in leap years the twenty-eighth and twenty-ninth days of February should be considered as one day. In passing, the court was required to give the definition of a "day", and stated that it meant a period of time consisting of twenty-four hours. In view of the Tax Court's Rules, that concept, however, has no application in the interpretation of Section 272(a) of the Internal Revenue Code, as the previously cited cases conclusively show. In *People v. Hatch*, 33 Ill. 9, the court was called upon to pass upon what constituted a "day" of the session of the legislature. It held that an adjournment at 10:00 a.m. did not constitute such a day. That ruling manifestly is not relevant to the problem under the statute here. In the matter of *Welman*, 20 Vt. 653, relied upon by taxpayer, is so obviously inapplicable as to require no discussion.

CONCLUSION

The Tax Court's order of dismissal was proper and should be affirmed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,

HELEN GOODNER,

VIRGINIA H. ADAMS,

Special Assistants to the Attorney General.

MARCH 1949.

No. 12099

United States
Court of Appeals
for the Ninth Circuit

GEORGE H. GRAHAM,

Appellant,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California, Southern Division

No. 26368-H

GEORGE H. GRAHAM,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a corporation, FIRST DOE
and SECOND DOE,

Defendants.

COMPLAINT FOR DAMAGES

Now comes plaintiff above-named, and for cause
of action against defendants, alleges as follows:

I.

That the defendants, First Doe and Second Doe
are sued and designated herein by fictitious names
for the reason that their true names are unknown
to this plaintiff, but that plaintiff will, upon as-
certaining their true names, substitute the same
for such fictitious names by proper amendment.

II.

That the defendant Atchison, Topeka and Santa
Fe Railway Company, a corporation was and is
organized and existing under the laws of the State
of Kansas, and doing business in the State of Cali-
fornia and other states, and that at all time herein
mentioned said defendant was engaged in the busi-
ness of a common carrier by a railway in interstate
commerce in the State of California and other
states.

III.

That at all times herein mentioned the defendant corporation was a common carrier by railway and interstate [1*] commerce and that said plaintiff was employed by said defendant in interstate commerce and the injuries to the plaintiff herein complained of arose in the course of and while the plaintiff and defendant were engaged in the conduct of interstate commerce.

IV.

That at all times herein mentioned, First Doe and Second Doe were agents, servants and employees of the defendant corporation and as such did act in the course and scope of their employment.

V.

That this action is brought under and by virtue of the provisions of the Federal Employer Liability Act, 45 U.S.C.A., 51, et seq.

VI.

That the plaintiff, at all times herein mentioned, was employed by the defendant corporation as a freight brakeman, in the defendant corporation's railroad yards in the City of Needles, County of San Bernardino, of the State of California.

VII.

That on or about the 6th day of July, 1945, at or about the hour of 1:30 a.m. o'clock of said day, while the plaintiff was employed as aforesaid in

* Page numbering appearing at foot of page of original certified Transcript of Record.

the defendant's railroad yards in the City of Needles, County of San Bernardino, and in the regular course and scope of this employment as a freight brakeman, the said plaintiff was required to and he did ride and stand on a caboose on the number 20 track in said yard, and that at said time and place, said caboose was stopped on said track number 20; that defendants did owe the plaintiff the duty of exercising ordinary care to provide him with a reasonably safe place in which to work and maintain any other cars or locomotives [2] on said track at a sufficiently safe distance from said caboose and to operate other cars and locomotives in said yard and in particular over and along said track 20 in a careful and prudent manner; that the said defendants did negligently and carelessly fail to maintain a reasonably safe distance between the caboose on which said plaintiff was standing and other cars and locomotives being driven and operated on said track number 20, and did fail to operate other cars and locomotives carefully on said track.

VIII.

That as a direct and proximate result of said negligence and carelessness, the said defendants did carelessly and negligently drive and operate a locomotive and other cars on said track number 20, so as to cause the same to and they did collide violently with the caboose on which the plaintiff was standing, causing the said plaintiff to be thrown about said caboose with such force and violence that he struck some portion thereof, the exact portion

being unknown to him, and as a result thereof said plaintiff was cut, bruised, lacerated and shocked, injured and made sick, sore and lame, both internally and externally, and more particularly injured as follows: spinal injury in the lumbo sacral region; severe shock to the nervous system; numerous contusions, bruises and abrasions about the head, arms, body and legs; all of which injuries plaintiff is informed and believes and therefore alleges are of a permanent nature.

IX.

That by reason of said negligence and carelessness as aforesaid, plaintiff has sustained general damages in the sum of Fifty Thousand Dollars (\$50,000.00).

V.

That said plaintiff has incurred indebtedness for medical care and attention reasonably required to treat the said injuries, in an amount not known at the present time; [3] and plaintiff prays leave, upon ascertaining said amount to amend this complaint to insert said amount; that the plaintiff will be compelled to incur in the future an additional indebtedness for medical care and attention to be rendered to the said plaintiff in the future to treat said injuries in an amount unknown at the present time, and plaintiff prays leave, upon ascertaining said amount to amend this complaint to insert said amount.

XI.

That at the time of said injuries the plaintiff was employed regularly by the said defendant cor-

poration as a freight brakeman and earning the sum of \$450.00 per month; that as a result of said injuries, plaintiff was compelled to leave his employment and was unable to work at his regular employment for a period of four months, and plaintiff is informed and believes and therefore alleges that he will be unable to work at his regular employment for an unknown period of time in the future; that plaintiff prays leave upon ascertaining the amount of his damages as a result of his loss of employment, to amend this complaint to insert said unknown amount.

Wherefore, plaintiff prays judgment as follows: that plaintiff be awarded judgment in the sum of Fifty Thousand Dollars (\$50,000.00); that plaintiff be allowed to file an amended complaint herein in accordance with the allegations of this complaint; that plaintiff have and recover special damages as herein set forth; that plaintiff have and recover his costs incurred herein; and, for such other and further relief as may be just and equitable in the premises.

HAROLD C. BROWN,
SAUL PERLIS,
Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Aug. 30, 1946. [4]

[Title of District Court and Cause].

ANSWER

Defendant, The Atchison, Topeka and Santa Fe Railway Company, for answer to plaintiff's complaint, admits, denies, and alleges:

I.

Defendant denies each and every, all and singular, the allegations contained in Paragraphs VII and VIII of the Complaint.

II.

With respect to Paragraphs IX of the Complaint, defendant denies that plaintiff has been damaged by any negligence or carelessness of defendant; and further denies that plaintiff has been damaged in the sum of Fifty Thousand Dollars (\$50,000.00), or in any amount, or at all.

III.

With respect to Paragraph X of the Complaint, defendant denies each and every, all and singular, the allegations therein contained. [6]

IV.

With respect to Paragraph XI of the Complaint, defendant admits that plaintiff was employed by it as a freight brakeman; alleges that it is not now able to state the exact amount of his monthly earnings, but will produce the same at any trial of said action; and that with respect to the remaining allegations of said Paragraph XI, defendant is without sufficient knowledge to form a belief as to the truth of said allegations and, therefore, denies each and every, all and singular, the allegations in said paragraph contained and not heretofore specifically admitted.

Wherefore, the defendant prays judgment that plaintiff take nothing, and for its costs herein incurred.

FIRST SEPARATE DEFENSE

Defendant, for its first separate defense to plaintiff's Complaint on file herein, alleges that at the time and place alleged in the Complaint plaintiff failed to exercise ordinary care for his own safety under conditions then existing, which lack of care on his part proximately caused or contributed to any injury or damage suffered by him; that any injury or damage suffered by plaintiff was proximately caused or contributed to by plaintiff's negligence.

Wherefore, defendant prays, that in the event any damages are awarded plaintiff herein, the amount thereof be reduced in proportion to plaintiff's contributory negligence.

SECOND SEPARATE DEFENSE

For its separate and further defense, defendant alleges that on the 1st day of October, 1945, and after the injuries set up in the Complaint, but before the commencement of this action, and for valuable consideration paid to plaintiff, the plaintiff released defendant from all liability to the plaintiff by reason of the injuries received by plaintiff as [7] alleged in the Complaint.

Wherefore, defendant prays judgment against plaintiff, that plaintiff take nothing, and for its costs herein incurred.

LEO E. SIEVERT,

CHARLES L. EWING,

By /s/ CHARLES L. EWING,

Attorneys for Defendant.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Sept. 25, 1946. [8]

[Title of District Court and Cause].

DEMAND FOR JURY TRIAL

To the Clerk of the District Court of the United States for the Northern District of California, Southern Division; Defendant, Atchison, Topeka and Santa Fe Railway Company, a corporation; and, Leo E. Sievert and Charles L. Ewing, its Attorneys:

You and each of you will please take notice that the plaintiff, George H. Graham, does hereby demand a trial by jury of the above-entitled action.

Dated this 24th day of September, 1946.

HAROLD C. BROWN,
SAUL PERLIS,
Attorneys for Plaintiff.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Sept. 26, 1946. [9]

[Title of District Court and Cause].

SUBSTITUTION OF ATTORNEYS

The plaintiff, George H. Graham, hereby substitutes Emmett R. Burns as his attorney in the above entitled action, in the place and stead of Harold C. Brown, Esq., and Saul Perlis, Esq.

Dated this 28th day of February, 1947.

GEO. H. GRAHAM.

We hereby consent to the substitution of Emmett R. Burns as attorney for the plaintiff George H.

Graham, in the above entitled action, in our place and stead.

Dated this 26th day of February, 1947.

/s/ HAROLD C. BROWN,

/s/ SAUL PERLIS.

I hereby agree to be substituted in the place of Harold C. Brown and Saul Perlis, Esq., in the above entitled action, as attorney for the plaintiff, George H. Graham.

Dated this 26th day of February, 1946.

/s/ EMMETT R. BURNS.

[Endorsed]: Filed April 28, 1947. [10]

[Title of District Court and Cause].

SUBSTITUTION OF ATTORNEYS

The plaintiff, George H. Graham, hereby substitutes Philander Brooks Beadle and Ernest E. Emmons, Jr., as my attorney in the above entitled action in the place and stead of Emmett R. Burns.

Dated: October 27, 1947.

GEO. H. GRAHAM,

Plaintiff.

I hereby consent to the substitution of Philander Brooks Beadle and Ernest E. Emmons, Jr., as attorneys for plaintiff in the above entitled action, in my place and stead.

Dated this 8th day of November, 1947.

/s/ EMMETT R. BURNS.

We hereby agree to be substituted in the place of Emmett R. Burns as attorneys for the plaintiff.

Dated this 31st day of October, 1947.

/s/ PHILANDER BROOKS BEADLE

/s/ ERNEST E. EMMONS, JR.

[Endorsed]: Filed Nov. 24, 1947. [11]

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 17th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL JURY IMPANELED

This case came on regularly this day for trial. Ernest E. Emmons, Esq., was present on behalf of the plaintiff, and George Smith, Esq., and Gus Baraty, Esq., were present on behalf of the defendant. Thereupon the following named persons, viz: Jesse B. Turner, Albert W. Shaw, James L. Collins, Milton T. Bryant, William Soto, Mrs. Mary M. Dart, Herbert G. Bull, Emory C. Neal, Fred K. Berger, Luetta G. Michael, Peter G. Quinn, Jr., and

Mrs. Hetty-Belle Marcus, twelve good and lawful jurors, after being duly examined under oath, were accepted and sworn to try the issues joined herein. Mr. Emmons and Mr. Baraty made opening statements to the Court and jury on behalf of the plaintiff and the defendant, respectively. George H. Graham was sworn and testified on behalf of the plaintiff, and Mr. Emmons introduced Plaintiff's Exhibit No. 1, which was admitted in evidence. The hour of adjournment having arrived, the Court, after duly admonishing the jury, Ordered the further trial hereof continued to August 18, 1948.

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 18th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL RESUMED

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was resumed. George H. Graham was recalled and further testified, and

Frederick G. Niemand was sworn and testified on behalf of the plaintiff. Mr. Emmons introduced Plaintiff's Exhibits Nos. 2, 3, and 4, which were admitted in evidence. Mr. Baraty introduced Defendant's Exhibits A, B, E, F, and I, which were marker for identification, and C, D, G, and H, which were admitted in evidence. The hour of adjournment having arrived, **the Court, after duly** admonishing the jury, Ordered the further trial of this case continued to August 19, 1948. [13]

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 19th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

(Trial Resumed.)

ORDER MOTION FOR DIRECTED VERDICT
FOR DEFENDANT GRANTED, VERDICT.

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was resumed. George H. Graham was recalled and further testified, and

Arthur Ralph Syock was sworn and testified on behalf of the plaintiff. Mr. Emmons introduced Plaintiff's Exhibit No. 5, which was admitted in evidence. Ralph Soto-Hall was sworn and testified on behalf of the defendant, and Mr. Baraty introduced Defendant's Exhibits J, K, L, M, N, and P, which were admitted in evidence, and Defendant's Exhibit O, which was marked for identification purposes only. The plaintiff thereupon rested. Mr. Baraty made a motion for a directed verdict for the defendant, and after hearing the attorneys herein, it is Ordered that said motion be and it is hereby granted. The Court thereupon appointed juror Number One as Foreman and directed that said juror sign a formal verdict. Said juror thereupon signed the verdict in the following form: "We, the Jury, find in favor of the Defendant upon the direction of the Court. Jesse B. Turner, Foreman." The Court thereupon Ordered that judgment be entered for the defendant upon the directed verdict, and the jury was excused from further service herein. [14]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Defendant upon the direction of the Court.

JESSE B. TURNER,
Foreman.

[Endorsed]: Filed at 3 o'clock and 55 Min. p.m.
Aug. 19, 1948. [15]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 26368-G

GEORGE H. GRAHAM,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a corporation,

Defendant.

JUDGMENT ON DIRECTED VERDICT

This cause having come on regularly for trial on the 17th day of August, 1948, being a day in the July 1948 Term of this Court, before the Court and a Jury of twelve persons, duly impaneled and sworn to try the issues joined herein; Ernest E. Emmons, Esq., appearing as attorney for plaintiff, and George Smith, Esq., and Gus Baraty, Esq., appearing as attorneys for defendant; and the trial having been proceeded with on the 17th, 18th, and 19th days of August in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed, and the Court having granted defendant's motion for a directed verdict, and after the instructions by the Court the jury having rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Defendant upon the direction of the Court. Jesse B. Turner, Foreman," and the Court having ordered that

judgment be entered in accordance with said verdict;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by his complaint herein. [16]

Judgment filed this 20th day of August, 1948.

/s/ C. W. CALBREATH,
Clerk.

Entered in Civil Docket Aug. 21st, 1948.

[Endorsed]: Filed Aug. 20, 1948. [17]

[Title of District Court and Cause.]

**MOTION FOR NEW TRIAL AND NOTICE OF
SAID MOTION AND HEARING THEREOF**
To the Defendant above named and to its Attorneys:

You Are Each Hereby Notified that on Monday, August 30, 1948, at the hour of 10 o'clock a.m. on said day, or as soon thereafter as counsel can be heard, the plaintiff above named, by his attorneys, will move the above entitled Court, the division thereof presided over by Honorable Louis E. Goodman, Judge of the United States District Court, at the courtroom of said Court in the U. S. Post Office Building, 7th and Mission Streets, in the City and County of San Francisco, State of California, for an order setting aside the verdict and judgment herein in favor of defendant and granting to plaintiff a new trial. Attached hereto, marked

Exhibit "A", and herein incorporated is a draft of the order which plaintiff proposes.

Said motion will be made on this motion and notice thereof, all of the records, papers and files herein including the minutes of the Court, and all the testimony taken therein.

Said motion will be made severally on each of the grounds herein stated and as follows:

1. Error in law in granting the motion of defendant for a directed verdict.

(a) The issue presented was one of fact for the jury to decide.

2. The evidence is insufficient to sustain the verdict.

3. The verdict is against the weight of the evidence.

4. The verdict is against the law. [8]

Wherefor, it is moved and will be moved and is prayed that the verdict and judgment be set aside and a new trial be granted to plaintiff George H. Graham.

/s/ PHILANDER BROOKS
BEADLE,

/s/ ERNEST E. EMMONS, JR.,
Attorneys for Plaintiff.

(Acknowledgment of Receipt of Copy.)

(Here follows Exhibit "A"—Order Granting New Trial [Not Signed])

[Endorsed]: Filed Aug. 25, 1948.

[19]

[Title of District Court and Cause.]

**ORDER DENYING MOTION FOR
NEW TRIAL**

After the completion of plaintiff's case upon the trial herein, the Court directed a verdict in favor of the defendant. The directed verdict was ordered because the Court found that no evidence of any kind had been presented showing or indicating that the agreement of release and settlement made by the parties was due to either mutual mistake or fraud. Nor was there any evidence from which any inference of mistake or fraud could be drawn. Hence no factual issue required resolution by the Jury.

Re-examination of the question following plaintiff's motion for a new trial does not disclose that the Court committed any error in directing the verdict. Consequently the motion for a new trial is hereby denied.

Dated September 20, 1948.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Sept. 20, 1948.

[20]

[Title of District Court and Cause.]

**NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS**

Notice Is Hereby Given that plaintiff, George H. Graham, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the

judgment entered herein on August 21, 1948, and from the whole thereof, and from the order entered herein on September 20, 1948, denying his motion to set aside the verdict and judgment for defendant and to grant plaintiff a new trial herein and from the whole thereof.

Dated October 13, 1948.

PHILANDER BROOKS
BEADLE,
ERNEST E. EMMONS, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 16, 1948. [21]

CASH BOND

Know All Men By These Presents:

That we, Philander Brooks Beadle and Ernest E. Emmons, Jr., depositing the sum of \$250.00 with the Clerk of the United States District Court, Northern District of California, Southern Division, are held and firmly bound unto the Atchison, Topeka & Santa Fe Railroad, a corporation, in lieu of surety or sureties, in the full and just sum of said Two Hundred Fifty Dollars (\$250) to be paid to the said Atchison, Topeka & Santa Fe Railroad, a corporation, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of October in the year of our Lord One Thousand Nine Hundred and Forty-eight.

Whereas, lately at a District Court of the United States for the Northern District of California, in a suit pending in said Court, between George H. Graham, plaintiff, versus the Atchison, Topeka & Santa Fe Railroad, a corporation, defendant, and numbered therein 26368-G, a judgment was rendered against the said George H. Graham and the said George H. Graham having filed in said Court a notice of appeal to reverse the said judgment in the aforesaid suit, on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said George H. Graham shall prosecute his appeal [22] to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated October 28, 1948.

PHILANDER BROOKS
BEADLE,
ERNEST E. EMMONS, JR.,

Acknowledged before me the day and year first above written.

(Seal) /s/ AURELIA WOODARD,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 28, 1948. [23]

[Title of District Court and Cause.]

DESIGNATION OF POINTS ON WHICH
APPELLANT WILL RELY ON APPEAL

On appeal to the United States Court of Appeals for the Ninth Circuit, the appellant herein will rely upon the following points:

I.

The uncontradicted evidence adduced at the trial establishes

(a) Defendant's liability as a matter of law, and

(b) That the release pleaded in defendant's answer is invalid as a matter of law. [24]

II.

The District Court erred in directing a verdict in favor of defendant.

III.

The District Court erred in holding that the release signed by plaintiff was, as a matter of law, a bar to this action. Even if appellant's point I, supra, were not well taken, the evidence at least presented the following questions of fact, which should properly have been submitted to the jury:

1. Whether the acts of the defendant in dealing with appellant constituted fraud;
2. Whether there was a mutual mistake of a material fact at the time of execution of the release;
3. The nature, extent, exacerbation and permanency of appellant's alleged injury;
4. Whether appellant knew or suspected the nature, extent, exacerbation or permanency of his alleged injury; and
5. Whether appellant had effectively rescinded the release.

IV.

The District Court erred in refusing to permit counsel for appellant on direct examination to put to appellant the question whether appellant "knew or suspected" that he had suffered a permanent spinal injury at the time he signed the release.

Dated: October 28, 1948.

PHILANDER BROOKS BEADLE,
ERNEST E. EMMONS, JR.,

Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed Oct. 28, 1948. [25]

[Title of District Court and Cause.]

DESIGNATION OF PAPERS FOR RECORD
ON APPEAL

To the Clerk of the above Court:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal filed herein, a transcript of the record to consist of the following:

1. Complaint.
2. Answer.
3. Verdict of Jury. [26]
4. Judgment on Directed Verdict.
5. Motion for New Trial.
6. Order Denying New Trial.
7. Demand for Jury Trial.
8. Substitution of Attorneys.
9. Notice of Appeal.
10. The Minutes of the Trial.
11. Transcript of Oral Testimony.
12. Designation of Papers for Record on Appeal.
13. Designation of Points on Which Appellant will Rely on Appeal.
14. Cash Bond on Appeal.

PHILANDER BROOKS BEADLE,
ERNEST E. EMMONS, JR.,
Attorneys for Plaintiff.

Dated: October 28, 1948.

[Endorsed]: Filed Oct. 28, 1948. [27]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to . . , inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of George H. Graham, Plaintiff, vs. Atchison, Topeka and Santa Fe Railroad, a corporation, Defendant, No. 26368H, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$7.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 24th day of November, A.D. 1948.

(Seal) C. W. CALBREATH,
Clerk. [28]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

August 17, 18, and 19, 1948

Appearances: For the Plaintiff: Ernest E. Emmons, Esq. For the Defendant: George Smith, Esq., and Gus Baraty, Esq.

The Court: Well, we will proceed with the case. Will you call your witness, counsel?

Mr. Emmons: Yes. Mr. Graham, will you take the stand?

GEORGE H. GRAHAM,

Called on his own behalf, sworn.

Q. (The Clerk): Will you state your name to the Court and jury?

A. George H. Graham.

Mr. Emmons: I take it, counsel, that you will stipulate that the railroad was engaged in interstate commerce at the time of the accident?

Mr. Smith: Yes.

Mr. Emmons: And that the plaintiff was employed as a brakeman?

Mr. Smith: That's right.

Direct Examination

Q. (Mr. Emmons): Where do you reside, Mr. Graham? [2*]

A. Searchlight, Nevada.

Q. And what is your occupation?

A. Well, I am in the mining business a little bit, do a little mining.

Q. And are you a railroad man?

A. Yes, sir.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

(Testimony of George H. Graham.)

Q. Were you ever employed by the Santa Fe Railroad? A. Yes, sir.

Q. And were you working as a railroader on July 5, 1945? A. Yes, sir.

Q. What time did you start work on that date?

A. The Santa Fe?

Q. With the Santa Fe. No, on that particular day, July 5, 1945. A. February 13, 1943.

Q. You misunderstood my question. What time in the morning did you start work on July 5, 1945?

A. Oh, eleven o'clock in the morning.

Q. At eleven o'clock in the morning. And where did you start work?

A. At Seligman, Arizona.

Q. And in what capacity did you work at that time? A. As a flagman.

Q. As a flagman. Were you on a freight train or a passenger train? [3] A. Freight train.

Q. How many cars, approximately, were in that freight train? A. Oh, about 70.

Q. 70 freight cars. And were you a flagman on the head end of the engine of the train, or the rear of the train? A. The rear.

Q. And where were you on the train?

A. On the rear end.

Q. Were you in the caboose?

A. In the caboose.

Q. And is that your normal position on the train?

A. That is the flagman's position.

Q. I see. And where were you en route, what was your destination?

(Testimony of George H. Graham.)

A. My destination was Needles, California.

Q. And they have a freight yard there?

A. How is that?

Q. They have a freight yard at Needles?

A. A freight yard; yes, sir.

Q. Now can you see this diagram here, Mr. Graham? Can you see this all right?

A. I can see it.

Q. Now you are familiar with the freight yard there at Needles, California, are you? Just answer my question, please. Are you familiar with the freight yard at Needles, California? [4]

A. Very familiar.

Q. Yes. Now this diagram is a very rough diagram, but am I right in putting on this diagram that this is the east end of the yard, the top of the diagram is south, and the right-hand side here is west and the north side is down here—is that correct? A. That's right.

Q. Now down here on the north-east section, is this all river down here?

A. That is the Colorado River.

Q. The Colorado River? A. Yes, sir.

Q. Now these two lines up here, are they the main tracks, the main line for passenger——

A. Two main lines.

Q. Now the fartherest one to the south is the east main line, and where does that line go?

A. To Chicago.

Q. To Chicago. Now the west line is this second line, is that true? A. That's right.

(Testimony of George H. Graham.)

Q. And that goes to Needles, does it?

A. Needles.

Q. And to Los Angeles?

A. Los Angeles. [5]

Q. Yes. Now these next lines I have indicated here as 16 and 17, do they go as indicated, and move into Track No. 20. extended? A. No. 20.

Q. Now, then, 18 and 19 do the same, is that true? A. That's right.

Q. Now on that particular date and at that time, do you recall whether or not there was a spur track down in this location? A. There was.

Q. And about how far from, say, this switch lock here down to that spur track, how far would you say that would be in car lengths?

A. Oh, I would say 15 cars, or maybe more.

Q. Now let me ask you this: On the particular morning in question, about what time did you arrive in the yard?

A. Oh, about one o'clock.

Q. About one o'clock. And where did you park, or where did the train stop with reference to the ice house?

A. The final stop was inside of Number 20 track there.

Q. On Number 20 track—this one that goes right along here? (Indicating.)

A. That's right.

Q. And where did the head of the train stop?

A. Well, it would be up there on the west end there, just in the clear of the lead there.

(Testimony of George H. Graham.)

Q. Right here, right about here? [6]

A. Right in there.

Q. Right in there. And where was the caboose at that time?

A. Right east of the ice house, about two or three car lengths.

Q. East of the ice house; that would be this direction? A. That's right.

Q. Would this little train in here that I marked be about right?

A. That is about right.

Q. That is a very rough diagram. It isn't made in scale; you understand that, don't you?

A. Yes.

Q. Then what would be the distance from the caboose to the spur track over here? (Indicating.)

A. Oh, I would say it would be seven or eight hundred feet.

Q. Would you say in car lengths, of the regular box cars? A. How is that?

Q. Could you put that seven or eight hundred feet into box car lengths? A. You could.

Q. About how many box cars would that be?

A. Well, 20 cars would be about eight hundred feet.

Q. I see. It would be about 40 feet a piece, would it? A. That's right.

Q. On the night or the morning of the accident, were there any cars in this spur track? [7]

A. There was.

Q. What do you call those cars?

(Testimony of George H. Graham.)

A. Well, outfit cars.

Q. Outfit cars; what are they?

A. Well, people are living in them that work on the track—extra gangs and such as that.

Q. I see. Now let me ask you this; on this line along here, is there a short curve going around there? A. That's right.

Q. There is a slight curve there, is there?

A. A slight curve.

Q. Now on the morning of July 6, 1945, when you arrived there and the train stopped, what were your duties as a flagman?

A. To stay on there until we pull into the yard.

Q. And did you display any markers or signals of any kind?

A. I had them on when I got there, but I took them down.

Q. What did you have on there at the time?

A. Well, red markers and yellow.

Q. Red and yellow markers? A. Yes.

Q. And did you take them down?

A. I took them down.

Q. Now is there a company rule in that yard, Mr.— A. There is.

Mr. Baraty: I object; the rule, your Honor, is the best [8] evidence.

Mr. Emmons: Do you have a copy of the rule books, counsel?

Mr. Baraty: Yes, we have.

Mr. Emmons: May I have it, please?

(Testimony of George H. Graham.)

Mr. Smith: I think you have a copy of it, Mr. Emmons.

(Conversation among counsel out of hearing of reporter.)

Mr. Emmons: Is it stipulated these are the Company Rules that were in force and effect at the time of the accident?

Mr. Baraty: Not all of them. The one you are going to read now, we will stipulate was a company rule enforced at the time of this accident. It is on page 39, I think.

Q. (Mr. Emmons): I will read this rule to you, Mr. Graham, and I will ask you if you are familiar with this rule, Rule 19-A of the Rules and Regulations of the Operating Department of the Santa Fe Railroad (Reading.):

“On arrival at terminals, markers or classification signals must not be removed until the train has been delivered to the yardmen or placed clear of the main track.”

Now, you are familiar with that rule, are you?

A. I am.

Q. And you knew about that rule at the time you entered the yard? A. I knew about it.

Q. And when you were on this track, when this train was on [9] this track, on Track 20, was it off the main track?

A. Way off, way in the clear.

Q. Let me ask you this question: What are the yard limits of the Needles Yard?

(Testimony of George H. Graham.)

A. Well, the yard limit is, any place where there is a yard, within the yard limits boards. There is yard limit boards stationed out on either side of the town.

Q. I see. A. Or the place.

Q. Now, is the yard limit on the east side, the direction from which you were coming, how far down this way or east of the ice house is that?

A. About a mile, a mile and a quarter, maybe further from the ice house.

Q. Is that where the lead comes in?

A. The lead comes in west of the yard limits board.

Q. Yes. Off the main track? A. Uh-huh.

Q. And the train being off the main track, you took down the markers, is that it?

A. That's right.

Q. Now, Mr. Graham, while you were there at about one o'clock in the morning, and you had taken down the markers, what else did you do at that period?

A. Well, I crawled up in the cupola to avoid the mosquitoes. [10] They were swarming all around there.

Q. Yes?

A. And I was sitting there waiting to pull on into the yard.

Q. I see. Now what yard do you mean by that?

A. The yard that was up west of there.

Q. You mean the additional part of the yard?

A. That's right.

Q. What is this, more freight yard up there?

(Testimony of George H. Graham.)

A. More freight yard up above there.

Q. And you sat here in the caboose, did you?
Is this a fairly rough idea of a caboose, this little rectangle here, showing the cupola on top?

A. That's right.

Q. Does that have observation windows in the side?
A. That is it.

Q. And those markers that you took down, would they be on the back of the cupola like that?
(Indicating.) A. The side of the car.

Q. On the side of the car?

A. The rear of the car.

Q. Up this way?
A. That's right.

Q. Like ears on it. Now that cupola—I mean, the caboose, does it have some kind of a barricade or bar across it to withstand shock, bumping around? [11]

A. Well, that is, it has a drawbar and a platform.

Q. A drawbar and a platform?

A. With a railing there and with a ladder that goes up to the top, up on top.

Q. I see. Is that to take up the shock of——

Mr. Baraty: We object to that as leading and suggestive, if your Honor please; he can tell us what it is.

Q. (Mr. Emmons): What is the purpose of this drawbar?

A. Well, it is a safety precaution, and a place to stand on, and you have your steps on either side, with the grabirons.

(Testimony of George H. Graham.)

Q. All right.

A. That is what is called a platform caboose.

Q. I see. Now at this time, when you were in the caboose, could you see any approaching traffic on line 20?

A. I saw a headlight coming behind me.

Q. And where were you when you saw the headlight?

A. On the right side of the caboose ahead of the cupola.

Q. On this side? A. That's right.

Q. That would be on this side going——?

A. Going west.

Q. All right. Now were you looking backwards?

A. I saw the reflection in the window—drew my attention first.

Q. I see. [12]

A. And I turned around and looked back.

Q. Now when you were looking back, how far behind you did you see the headlights? Approximately how many car lengths?

A. Oh, quite a ways; the reflection, I could see it.

Q. Well, could you tell us in distance, with relation to this spur track down here?

A. Oh, I would say maybe six, seven, eight hundred feet or a thousand feet.

Q. Way down the track?

A. Way down there.

Q. What did you do after you saw that?

A. I kept watching it.

(Testimony of George H. Graham.)

Q. You kept watching that approaching train, and then what did you do?

A. Well, I saw him coming around those outfit cars, and I watched him again, and I saw he was coming around and I thought he was coming a little bit fast, so I put my body out the cupola window and put my lamp out to slow him down, and he kept right on coming.

Q. I see. You signaled him out of the cupola window, this window here, is that right?

A. Yes, that's right.

Q. Now did you get any response to your signal?

A. None.

Q. Did he continue to come? [13]

A. Continued to come on.

Q. I see. What did you do next, then?

A. Well, I got down and went back on the platform and put my lamp, to slow him down again. Then I reached for a fussee, and he was too close for me, and I didn't have time to act, then I went back in the caboose and made a jump to the cupola to get up there in the event of a collision, so that I would have a chance to get out of the cupola window.

Q. I see. Now am I correct now, on this side of the river, pointing to the north, which is the bottom of the diagram—that is all river, that is the Colorado River? A. That is all water.

Q. Now directly to the north or the south, rather, on the other side of Track 20, what was in there, if anything?

(Testimony of George H. Graham.)

A. Well, it was strewed all along there with ties stacked in there.

Q. Ties were stacked in there? A. Yes.

Q. Could you have jumped on that side?

A. No, can't jump on that.

Q. So when you found that you were in the position of having to jump down the river or on these ties next to the cupola and the approaching train, you decided to go back into the caboose and you went up into the cupola, is that right?

A. That's right. [14]

Q. Now did you get up into the cupola?

A. I didn't quite reach it.

Q. How far up did you get?

A. I was on the step and across, and when they hit——

Q. Did you have a hold of anything when you were up there?

A. Well, I had ahold of a grabiron there; there is a long iron that goes across both sides.

Q. And what happened while you had ahold of that grabiron?

A. Well, it just pitched me up into the air and down on the floor.

Q. Is there an opening up in here, similar to that? (Indicating.)

A. Well, there is two rear windows there.

Q. Well I mean, is there an opening to get up into the cupola?

A. Well, there is a space about that wide, (indicating) and a ladder about that **high from the**

(Testimony of George H. Graham.)

floor. (Indicating.)

Q. About what would be the distance from the floor of the caboose up to the top?

A. To the roof or to the platform? To the platform, oh, I would say five feet, maybe six feet.

Q. I see. And was there any impact, did this engine come and hit the caboose.

A. Terrible impact.

Q. I see. And as a result of that impact, you fell down?

Mr. Baraty: Let him say it; your Honor, I don't think he should be led. [15]

Q. (Mr. Emmons): Well, is that true?

Mr. Baraty: That is objected to; it is leading and suggestive.

Q. (Mr. Emmons): Well, what happened when the impact was there, Mr. Graham?

The Court: Well, he has already answered. He said that he fell down.

Mr. Emmons: Yes, I think so.

Q. (Mr. Emmons): Did you fall directly to the floor of the caboose?

A. I fell on the floor.

Q. And what portion of your body struck the floor?

A. Well, on my back, and my hip and my head and shoulders—left shoulder.

Q. Now were you able to get up at that time?

A. I tried to get up, was getting up on my feet when the other crash took place.

Q. Now do you know what caused the other crash?

(Testimony of George H. Graham.)

A. Yes, the engineer became excited and reversed his engine and jerked back away from the caboose, and dropped the caboose right onto the rails.

Q. I see. Now were you able to get out—wait, strike that. After this second impact and the caboose dropped to the ground, did anything happen to you?

A. Oh, I don't know; it was dark in there and things were [16] falling around, and I just couldn't say what did happen in there.

Q. Well, were you thrown to the floor or did anything else happen to you at that time?

Mr. Baraty: Now, your Honor, I will object to the leading questions. The witness is testifying that he doesn't know. I will object to a leading question on the subject now before the Court.

Q. (Mr. Emmons): Well, you tell us what happened at the time of the second impact, Mr. Graham.

A. Well, I managed to get out of the caboose after the second crash.

The Court: No, he wants to know what happened to you at the time of the second crash.

Q. (Mr. Emmons): At the time of the second crash?

A. Well, I went down again on the floor and I probably slid through the car door; I don't know, because the caboose was standing on an angle like that. (Indicating.)

Q. I see. Well, am I correct in saying that this is your testimony, that after the first—

(Testimony of George H. Graham.)

Mr. Baraty: Your Honor, I will object to this, the form of this question. It is his testimony, it has already been asked and answered.

The Court: Yes.

Mr. Baraty: If it isn't, the question is leading and [17] suggestive. I object to it on that ground.

The Court: Yes. Why don't you ask him, counsel, what the position of the caboose was at the time of the collision, and then whether it changed its position or not, and then maybe you can get these facts in the record.

Mr. Emmons: Very well.

Q. (Mr. Emmons): What was the position of the caboose at the time of the first impact?

A. It was on an angle, about like that. (Indicating.)

Q. And at the time of the first impact?

A. That's right, it was right up through a car of bananas ahead, just sliced right on through it.

Q. All right. Now at the time of the second impact, what happened? What was the position of the car, rather?

A. Well, it went right down to the rails, and of course that increased the incline to about forty-five degrees, maybe a little more. (Indicating.)

Q. I see. And what happened to you when this increased its incline?

A. Well, I just got up again some way and slid out the door. I couldn't walk, because the incline was too great. And I got out on the platform and got down on the ground some way.

Q. Let me ask you this: Will you describe what

(Testimony of George H. Graham.)

the contents of the caboose are, or might be? That is, in relation to furniture and utensils, or whatever may be in there. [18]

A. You mean the contents and all?

Q. Yes, all around. What is on the inside of the caboose?

A. Oh, oil cans, a stove, spare knuckles, pins.

Q. Will you explain what a knuckle and a pin is? A. Well——

The Court: Well, counsel, I understood your opponent to say that there isn't very much dispute about the facts as to the collision, the fact that this collision took place.

Mr. Emmons: Well, the injury, though, is in dispute, your Honor.

The Court: Well, I think that if you describe all the contents of the car, that is going to take a long time, unless it has something to do with the injury.

Mr. Emmons: I think it has, if we may go into it.

The Court: Why don't you ask him what was the nature of the injuries he suffered, where he had pain, where he hit himself, how he was thrown, and have him describe all that?

Q. (Mr. Emmons): Well now, Mr. Graham, at the time this happened, were you injured?

A. At the time it happened?

Q. Yes. A. No, no, I was——

Q. Well, as a result of this accident, were you injured?

A. After the collision, I was all knocked to pieces.

(Testimony of George H. Graham.)

Q. You were? And what was the type injury that you suffered? [19]

A. Well, I couldn't say. I was dazed and severe pain in my hip and my left shoulder and head—a big cut over my eye and other scratches. And from falling glass.

Q. You stated you got out of the caboose, and what did you do next after you got out of the caboose?

A. Well, I couldn't tell you off-hand, because I was in a dazed condition, and I got out there and somebody got ahold of me, and the engineer was down on the ground looking over the thing and yelling his head off.

Q. I see.

A. Things were rather excitable around there at that time.

Q. I see. Now after this accident, what way did you go? That is, immediately after the accident?

A. Well, I believe I walked down the track. It has never been clear in my mind whether I did or not, but I think I cut those cars off.

Q. The last two cars?

A. The last two cars and the caboose; that would be three cars.

Q. I see. Why did you do that?

A. Well, I saw they were on the ground. I could see that much in spite of all the blood that was spurting around there. I know that if they started up, they would drag that track all to pieces and

(Testimony of George H. Graham.)

probably cause ten or fifteen, twenty thousand dollars worth of damage.

Q. And that night or morning, where did you go immediately [20] after this?

A. Well, I made it over to the main line, the west-bound main line, right in that curve there.

Q. Yes?

A. And there was a passenger train went by, then another one, and one of them stopped right there and the vestibule doors right in front of me were open, and I crawled in there and rode up to the station.

Q. I see. And when you got to this station, what happened?

A. Well, I got off, and of course everybody crowded around me and wanted to know what happened and this and that, and I told them. A fellow by the name of Beadle got ahold of me and tried to take me to the hospital, and I just didn't want to go there to the hospital.

Q. Where did you go? A. I went home.

Q. How did you get home?

A. Well, some railroad man picked me up in his car, took me over.

Q. Where is your home?

A. At that time it was in Needles. I had a little cottage there.

Q. Yes, and where did you go after that?

A. Well, I washed up a little bit and then I decided I would go home to Searchlight. [21]

Q. You have a home in Searchlight; that is in Nevada, is it?

(Testimony of George H. Graham.)

A. Well, I live up there.

Q. And how long did you stay at Searchlight?

A. Oh, three days, about.

Q. And were you up and about, or were you in bed?

A. No, I was down.

Q. Were you in bed? A. Yes.

Q. And who took care of you?

A. How is that?

Q. Who took care of you there?

A. My wife.

Q. And where did you go subsequent to that?
Did you go anywhere else?

A. Well, I went to Boulder City on the 9th.

Q. And who did you go to see?

A. Dr. Fenlon.

Q. F-e-n-l-o-n? A. F-e-n-l-o-n.

Q. How did you get to Boulder City?

A. Drove up.

Q. Did you drive or did your wife drive?

A. No, my wife drove the car.

Q. About how far is it to Boulder City?

A. About 40 miles. [22]

Q. And there did you see Dr. Fenlon?

A. I did.

Q. Did he take any X-rays at that time?

A. No.

Q. What did he tell you to do?

A. Well, he just looked me over and ordered me to bed.

Q. To bed. And then did you return home?

A. I went on home.

(Testimony of George H. Graham.)

Q. How long were you at home?

A. Oh, I was probably two or three weeks. I can't tell off-hand—that is so far back.

Q. I see. Now did you attend an investigation by the company at Needles? A. I did.

Q. Did you make a report of the accident?

A. Well, they held an investigation to find out the guilty parties and the ones at fault. I did go in there on the 16th.

Q. It was on the 16th, was it?

A. Yes, that's right.

Q. And did you see a doctor while you were there?

A. I can't say whether I saw a Dr. Price along that time; I think that day or the next day or the day after—it was along that time.

Q. What did Dr. Price do for you, if anything?

A. Nothing, just look me over and said, "Well, you have got [23] some bad bruises and contusions."

Q. Did he give you any medicine?

A. None. Oh, some pills to kind of relieve the pain a little bit.

Q. Did you go back to Searchlight?

A. I went back to Searchlight.

Q. On July the 17th or 18th?

A. Along in there.

Q. When did you next go to Needles to seek medical attention?

A. Oh, that would be along in early August, maybe.

Q. Who did you see then? A. Dr. Holtz.

(Testimony of George H. Graham.)

Q. And did you talk to him about your condition?
A. Oh, yes.

Q. What did he tell you to do?

A. Well, he ordered me into the hospital.

Q. Into what hospital?

A. The Santa Fe Hospital in Los Angeles.

Q. And were you suffering any pain at that time?
A. Quite a bit.

Q. Did you inform him as to those pains?

A. How's that?

Q. Did you tell the doctor what pains you had?

A. Oh, yes.

Q. What pains were you suffering at that time? [24]

A. Well, mostly in my hip and back and my left shoulder was giving me bad trouble, and the back of my head.

Q. I see. Did you finally go to the hospital at Los Angeles?

A. I went in on the 10th of August.

Q. That is, the Santa Fe Hospital in Los Angeles?
A. Yes.

Q. And did you gain admission when you first went down there?
A. No, I didn't.

Q. When did you get into the hospital?

A. On the 14th.

Q. On the 14th?
A. Yes.

Q. What took place between the 10th and the 14th?

A. Well, they just didn't happen to have room out there, they told me to go on back down and

(Testimony of George H. Graham.)

get a room, and then they would have a cot in a day or two, or two or three days.

Q. I see. How did you get back and forth to the hospital? A. Yellow Cab.

Q. Yellow Cab Company — Yellow cabs each day? A. Both ways.

Q. You were admitted to the hospital on August 14th? A. On the 14th.

Q. That was in 1945? A. Yes.

Q. Did they take any X-rays while you were in this hospital? [25]

A. They did a few days after my admission.

Q. I see. Now did they give you any treatment while you were there?

A. Well, heat treatments, little lamps.

Q. And massage?

A. And that is about all.

Q. I see. A. Some pills.

Q. When did you leave the hospital?

A. On the 24th.

Q. Did you leave voluntarily? A. I did.

Q. Where did you go then?

A. How was that?

Q. Where did you go after that?

A. Well, I went back to town, then come on home.

Q. Back to Searchlight?

A. Searchlight, Needles and then Searchlight.

Q. Did you subsequently go back to see Dr. Fenlon?

A. I went back up to see him.

(Testimony of George H. Graham.)

Q. Do you remember about when that was?

A. Well no, it was right after I returned. And then I saw him, he saw me at various times in Searchlight.

Q. Did you ever have an occasion to talk to Dr. Morrison, the chief surgeon of the hospital there at Los Angeles? [26]

A. Yes, sir.

Q. On what date was that?

A. Well, that was on the 19th.

Q. On the 19th of what?

A. Of August, or September.

Q. Of 1945? A. Yes, sir.

Q. And did you discuss your condition with Dr. Morrison at that time?

A. Yes, I talked to him.

Q. And what did he tell you?

A. Well, he told me to go back to work if I possibly could, that the company was very short of men and that they needed to keep the trains operating—the war was still on, and to go back and take it easy, that I would be all right in thirty or sixty days. So he gave me a release and I went back, but I didn't go to work right at that time.

Q. Dr. Morrison told you that you would be all right within thirty to sixty days?

A. Thirty to sixty days, to take it easy.

Q. Did he tell you to go back to work at the same type of work that you had been doing before?

A. No, he didn't.

Q. What did he tell you?

A. Told me to take a passenger job, take it easy. [27]

(Testimony of George H. Graham.)

Q. Now I will show you——

(Document handed to Mr. Baraty by Mr. Emmons.)

Q. (Mr. Emmons): I show you here, Mr. Graham, a document headed “Discharge from treatment, the Santa Fe Hospital Association,” dated 9/18/45. (Handing to witness.) I will ask you if Dr. Morrison or one of his employees at that time gave you that discharge.

A. He gave me this certificate? He didn’t, but it was under his direction.

Q. While you were in his office, did someone, did he indicate somebody to make this out for you?

A. One of the clerks or one of the nurses or internes in the office.

Mr. Emmons: I will offer in evidence at this time this discharge from treatment dated 9/18/45, if the defendant has no objection.

Mr. Baraty: The defendant has no objection.

The Clerk: Plaintiff’s Number 1.

(Discharge dated 9/18/45 referred to above was received in evidence as Plaintiff’s Exhibit No. 1.)

Q. (Mr. Emmons): Now at the time that you talked to Dr. Morrison, was there any question regarding broken bones? A. No, none at all.

Q. Did he tell you that there were no broken bones?

A. Told me—he didn’t say there was no broken bones, he just [28] said, “Go back and take it easy, you will be all right, you can get along.”

(Testimony of George H. Graham.)

Q. Did you ever see the X-rays?

A. No.

Q. That the Santa Fe Railroad took?

A. No, they wouldn't show them to me.

Q. Did you know at that time that you had a fractured vertebra? A. No, I didn't.

Mr. Baraty: Well, your Honor, that is assuming something not in evidence; it is also leading and suggestive. I object to it on that ground. I ask that the answer be stricken out and that we have an opportunity to have our objection considered.

The Court: The answer may go out.

Mr. Emmons: I think the case is right directly in point, that that is one of the facts in issue, and that the——

The Court: Well, I think you are entitled to show that, but you have to first lay some foundation. You can ask him at this time if he knew whether he had any other injuries except what he had discussed with the doctor. You must establish his knowledge at the time. Then you can develop the other points later on.

Q. (Mr. Emmons): Mr. Graham, did you have any knowledge of any other injuries, other than those which you discussed with the doctor? [29]

A. No.

Q. And what injuries were discussed with the doctor?

A. Well, I told him my hip was hurting me, and my back, through the small of my back, and my shoulder. He felt me over. Well, he says, "You'll be all right; take it easy." He said, "Get back on

(Testimony of George H. Graham.)

the job." He repeated that several times, to get back on the job, that we needed every man we could get, the war was still on.

Q. Now after your conversation with Dr. Morrison, did you return to Needles or Searchlight?

A. I returned to Needles.

Q. And what did you do at Needles?

A. Well, I stayed there a day or two, maybe. I don't know how many days. Then I went back home to Searchlight, and I came back down to Needles and they wouldn't let me go to work without first getting a release.

Q. What kind of a release?

A. Well, a release to go back to work there. They wouldn't put me on the board or let me bid on a job of any kind until I had got a release.

Q. And what was your understanding in regard to the necessity for getting a release?

A. Well, that you could make some adjustment with the company.

Mr. Baraty: I will object to the question; I don't know what counsel means by "release" and I think it is immaterial, [30] what his understanding was.

The Court: Yes, that calls for—I will sustain that.

Q. (Mr. Emmons): Now, Mr. Graham, are you familiar with Rule 304 of the Company Rules?

A. I have read it, yes.

Mr. Baraty: I want to say this, your Honor, that Rule 304 was not in existence at the time of

(Testimony of George H. Graham.)

this accident. It is in the book, but it was not in existence; the book was published in 1926 or '27.

Mr. Emmons: If your Honor please, this is not the correct procedure to get evidence before the jury, and I think the proper way, if there is such evidence, is to bring it in on the defendant's case.

Mr. Baraty: Well, the objection is that there is no foundation laid.

The Court: Yes, why don't you ask the witness what the facts are? Never mind that rule. Have him tell his story and then you can lead up to the other matters, if you want.

Q. (Mr. Emmons): Well, at a time prior to this release, did you have a conversation with anybody in regard to settling this case with the railroad?

A. Well, I went into the trainmaster's office.

Q. And what were you told there?

A. And I was told that I would have to get a release from the claim agent. [31]

Mr. Baraty: I think we should have some foundation—date, persons present, and so on.

The Court: Yes, you will have to state when this conversation took place, where and who was present.

Q. (Mr. Emmons): Mr. Graham, on what date did you go to the trainmaster's office?

A. Well, I would say around the 25th or 26th of September.

Q. All right, and who did you talk to in there?

A. Some clerk in there that—I don't know his

(Testimony of George H. Graham.)

name. They change so many around there. Some woman in there at that time that told me says, "Well, you can't go to work. Have you got a release from the claim agent?" I said, "No, I have one from the doctor." She said, "No, you will have to get one from the agent before you can go to work."

Q. In other words, you went there with the purpose of going back to work, is that right?

A. That's right.

Q. And they told you before you could go back to work, you had to have a release executed with the railroad company?

A. That's right.

Q. Before you could go back to work?

A. That's right.

Q. That a release would have to be secured as to your injuries which you suffered in this accident, is that right?

Mr. Baraty: What was the question? I didn't hear it. [32] May I have the question read, Mr. Reporter?

(Record read.)

Mr. Baraty: Well, I think that is leading and suggestive, your Honor. Also, it is repetitious.

The Court: Well, it can't be both, but it is leading and suggestive.

Q. (Mr. Emmons): Well, what kind of a release did they ask you for?

Mr. Baraty: Now, your Honor, I think there is no foundation laid for this. The witness says that some person made a statement, and for that to be

(Testimony of George H. Graham.)

binding on the company, the person who made it should be identified first.

The Court: Well, that is true.

Q. (Mr. Emmons): Who was it that you talked to there?

A. Well, there was some man in there, and then a woman.

Q. Well, do you know what his position in the company was? A. How's that?

Q. What was his job, what was his position?

A. Clerk in the trainmaster's office.

Q. I see. Were both these people clerks in the trainmaster's office? A. (No response.)

Q. Now you are a railroad man, are you not?

A. That's right.

Q. And you have been a railroad man for a number of years. [33] Are you familiar with the custom of roadmen in regard to this situation?

A. I am.

Mr. Baraty: What situation? All right.

Q. (Mr. Emmons): Now what has been the custom and the rule in the railroad business in that regard?

Mr. Baraty: We will object to any matter of custom or practice in regard to the situation; I assume counsel is talking about a release. Unless there is something here to do with the Santa Fe Railroad, what may be the custom elsewhere is not material to the point at issue here.

Mr. Emmons: All right, we will limit it to the Santa Fe Railroad.

(Testimony of George H. Graham.)

Q. (Mr. Emmons): What is it?

A. Well, I have seen other men down there that was in the same position as myself, that were not permitted to work until they made some adjustments.

Q. Did they execute a release?

A. They had to execute a release before they went to work.

Mr. Baraty: I will ask that that answer be stricken out as not establishing a custom. I think the Court well knows that that is not the rule.

The Court: Well, that last answer may go out. What he saw other men doing would be hearsay, too. The circumstances might not be the same. [34]

Q. (The Court): Is the trainmaster's office the place where you go to resume your work?

A. That's right, Judge.

Q. And that is where they give you your orders to report for duty? A. Yes, sir.

Q. Did you go there to go back to work? Is that what you went back for?

A. You have to go——

Q. Speak up a little louder, please.

A. The trainmaster's office is under the superintendent, and he handles all the conductors and trainmen and yardmen.

Q. And you went to the trainmaster's office to go back to work and somebody in the office told you you had to get a release?

A. That's right.

The Court: All right, you ask him, "What did you do next?"

(Testimony of George H. Graham.)

Mr. Emmons: What did you do then?

A. I went back to Los Angeles, or I went to see a claim agent by the name of Mr. Lewis, and he offered to make a settlement, but I had to go into Los Angeles and settle in Los Angeles.

Q. Let me ask you this: Did anyone ever approach you prior to the time that you talked to Mr. Lewis in regard to settling this case?

A. Yes.

Q. And where? [35]

A. In the Santa Fe Building in Los Angeles.

Q. And was that the hospital?

A. No, that was the Santa Fe Building on 6th and Main in Los Angeles.

Q. And who was that? A. Mr. Simms.

Q. Mr. Simms. And when was that?

A. Oh, that would be along, the 24th of August.

Q. Is that right after you got out of the hospital? A. (No response.)

Q. And what did he say in regard to this settlement?

A. Well, he wanted to settle with me, and I didn't consider it sufficient and didn't accept it.

Q. I see. So then what did you do?

A. I went back to Needles.

Q. And you went back to Needles. Now subsequently, you went to the trainmaster's office to go to work, is that it, and attempted to go to work?

A. I did, in the latter part of September.

Q. And then you saw this fellow, Mr. Lewis?

A. That's right.

Q. You had a conversation with him?

(Testimony of George H. Graham.)

A. I did.

Q. And where was that?

A. In Needles. [36]

Q. In Needles, and where in Needles?

A. In the claim department, claim agent's office.

Q. And what was the subject of the conversation?

A. Well, I just told them I would like to settle and go to work, and he made me an offer, but I had to go to Los Angeles. I think they wanted to settle with me themselves, so I went in to Los Angeles.

Q. Subsequent to the time you talked to Mr. Lewis?

A. After I talked to Mr. Lewis.

Q. Then you went into Los Angeles?

A. I went in to Los Angeles.

Q. And who did you see in Los Angeles?

A. Mr. Hitchcock.

Q. Mr. Hitchcock. And where was this?

A. Up in the Santa Fe Building in Los Angeles.

Q. In the claims department?

A. In the claims department.

Q. About what date was that?

A. That was about the 31st, around the first of October or the 30th of September.

Q. Was that the date the release was signed?

A. That's right.

Q. Did you enter into an agreement with them at that time? A. Did I what?

Q. Enter into an agreement with him at that time. [37]

(Testimony of George H. Graham.)

A. Well, he told me a thousand dollars, it was there—take it or leave it.

Q. I see.

A. So I thought, “Well, do the best I can.”

Q. And did you discuss the property damage that you suffered?

A. Well, I told him I had broke two pairs of glasses in the crash, and he paid me for them.

Q. \$50.00? A. \$50.00.

Q. Is that the total? Does that explain the \$1050? A. Yes, sir.

Q. Now with regard to this release, did you know at the time that you signed this release that you were suffering from any other injuries, other than the ones you knew about at the time you discussed this with Dr. Morrison? A. No.

Mr. Baraty: We will object to that.

A. (Continuing): I didn't know—

Mr. Baraty (Continuing): I don't think there is a proper foundation laid, and it is leading and suggestive. I haven't the least conception what somebody else may know about something. We don't know what this man has in mind when he says that. The question is what he knew about it.

The Court: Well, why don't you go ahead first, counsel, and find out if at some other time he had some other examination [38] where something was found the matter with him, and then go back. Let's try to move along.

Mr. Emmons: All right.

(Testimony of George H. Graham.)

Q. (Mr. Emmons): Did you subsequently go to work, go back to work? A. Did I what?

Q. Did you subsequently go back to work?

A. I went right back to work. I don't remember when I made the first trip.

Q. You mean right after you signed the release? A. Yes.

Mr. Baraty: That is leading and suggestive, your Honor, and I will show you after while why I think I am right. It is leading and suggestive. The question is, "—went right back to work after he signed the release."

The Court: Well, ask him the time and the date.

Q. (Mr. Emmons): When did you go back to work?

A. Well, I don't know; I think it would be maybe the first or second of October.

Q. Is that your best recollection on the subject?

A. It was right after I signed the release.

Q. (The Court): When you say, "right after" you mean the same day or a day or two afterwards?

A. A day or two after I signed the release.

The Court: A day or two after you signed the release. [39] All right; go ahead.

Q. (Mr. Emmons): Now, were you subsequently examined by Dr. Fenlon?

A. Dr. Fenlon saw me several times.

Q. I see. Were you able to continue work after that? A. Yes.

(Testimony of George H. Graham.)

Q. From then on?

A. No, I worked for about forty-five days.

Q. You worked about forty-five days; what was your condition during those forty-five days?

A. Bad.

Q. Well, will you explain what you mean by "bad"?

A. Well, I just couldn't get on and off good, and I couldn't do any—well, any active work, you know, like around a train, where you have got to be able to get on or off, sometimes at pretty high speed. And throwing switches, that was out of the question.

Q. (The Court): Well, he wants to know what it was that bothered you.

A. Well, it was right in the small of my back; that is where it gave me the trouble. And then stepping, my hip would catch on me.

Q. (Mr. Emmons): Now did you subsequently go to see Dr. Fenlon and have some X-rays made?

A. I went to Dr. Fenlon on the 13th of February, 1946. [40]

Q. And did he take X-rays at that time?

A. He did.

Q. And what did he tell you about that?

A. Told me——

Mr. Baraty: We will object to that as calling for hearsay testimony, and there is no basis or foundation for it. The defendant is not connected with the railroad company, or I mean the hospital.

The Court: Are you going to have any doctors testify?

(Testimony of George H. Graham.)

Mr. Emmons: Well, your Honor, we have the X-rays.

The Court: You have the X-rays?

Mr. Emmons: Yes, your Honor.

The Court: Are you going to have someone testify as to the X-rays?

Mr. Emmons: Yes.

The Court: I see.

Mr. Baraty: The question is, what did this doctor say to him? The doctor who signed it is not going to be present here, and that is hearsay evidence, not connected with the defendant corporation or the hospital association in any form.

The Court: Yes, that is true.

Mr. Baraty: It is Mr. Graham's own personal doctor.

The Court: Well, are you offering this in proof of an injury, or is this in connection with the knowledge of the plaintiff? [41]

Mr. Emmons: The knowledge of the plaintiff.

Mr. Baraty: No, it can't be that, because the testimony is directed to the 13th of February, 1946, and this release was on the first of October, 1945. Now they obtained this later on, and it is still subject to the point that it is calling for hearsay testimony. Dr. Fenlon should be here like anybody else has to come in here.

Mr. Emmons: That isn't true; it is merely a question pointed toward the knowledge of this plaintiff as to when he acquired knowledge of an

(Testimony of George H. Graham.)

injury other and different from the one he discussed with Dr. Morrison prior to signing the release. [42]

Q. (By Mr. Emmons): Mr. Graham, were you subsequently informed by another doctor that there was an injury to your spine?

A. Only Dr. Fenton.

Mr. Baraty: Now that is leading and suggestive, your Honor—the time and place and persons present.

Mr. Emmons: All right.

Mr. Baraty: And besides, it calls for hearsay testimony. Now we can't tell whether this is the same doctor or another doctor.

Q. (By Mr. Emmons): On February 13, 1946—

Mr. Baraty: May we have a ruling, your Honor?

The Court: Well, he is asking the question. There is no sense of my ruling on it.

Mr. Baraty: Pardon me, your Honor.

Q. (By Mr. Emmons): Mr. Graham, you had X-rays taken by Dr. Fenlon at Boulder City, did you? A. That's right.

Q. And were you informed at that time that you had an injury to your back?

A. He told me there. [44]

Mr. Baraty: Now we object to that as hearsay testimony.

The Court: For the limited purpose I have already stated, it may be allowed.

Q. (By Mr. Emmons): Now, Mr. Graham, was that the first time that you had known about this

(Testimony of George H. Graham.)

Q. And did you know about this injury at the time that you signed the release that you signed on October 1, 1945? A. No, I didn't.

Q. Now you say you worked for about forty-five days after the accident here in question. Now what was the last date that you worked, if you can recall?

A. Oh, 22nd, 23rd, 24th—maybe the 24th or 25th of November.

Q. Of what year? A. Of 1945.

Q. And did you ever return to work again?

A. Not until January 16, 1946.

Q. And how long did you work that time?

A. Just two round trips—four days.

Q. About four days. And then what occurred?

A. Oh, I got into a jam with the company officials down there. They framed me up on a false charge.

Mr. Baraty: Now, your Honor——

Mr. Emmons: I will stipulate that may go out.

The Court: Yes, that may go out. [45]

Q. (By Mr. Emmons): Just say what happened.

A. Well, I was under the influence of sulphadiazine drugs, and I was pretty sick, and they pulled me off the trip as being intoxicated in Los Angeles, and—which I wasn't——

Q. Now what was the conclusion of that? What happened as a result of that?

A. Well, they just pulled me off the train and wouldn't let me go out.

The Court: Well, you want to know whether he was discharged?

(Testimony of George H. Graham.)

Mr. Emmons: Yes.

Q. (By the Court): Were you then discharged?

A. I was discharged. Well, I will take that back; there was an investigation held on the 24th of January, and it was closed out the 16th of February and I was discharged for violation of a rule, which I wasn't guilty of.

Q. (By Mr. Emmons): Were you ever exonerated from that?

A. No, they found me guilty.

Q. I see. Now have you been able to work since that time? A. No, I haven't.

Q. Have you attempted to work?

A. Well, I went to Las Vegas one time and thought I would go to work, but I wasn't successful. I couldn't stand it there a full eight hours. I just give it up.

Q. Did you do any work around your house?

A. No, not much.

Q. How do you get along?

A. Well, I had a little mine.

Q. I see. And during the time that you worked for the Santa Fe Railroad, how much did you make a month?

A. Well, that averaged, more or less—sometimes \$350, sometimes \$400, or \$450.

Q. As high as \$450?

A. And more than that.

Mr. Baraty: Now, your Honor, I think—I would like to tell counsel that we can—

(Testimony of George H. Graham.)

The Court: Well, yes, let's save time. Can't you use the record on that?

Mr. Emmons: They won't give them to me, so I couldn't stipulate to that. I don't know myself what the man made.

Mr. Baraty: Mr. Emmons, you never asked us for the paysheet records of this man. You have got everything else you asked for.

Mr. Smith: Here they are.

The Court: Have you the pay sheet record? Show them to counsel and see whether you can't agree on them so that we can save some time. In the meantime, we will take the afternoon recess. Ladies and gentlemen, please bear in mind the admonition of the Court.

(Short recess.) [47]

Mr. Emmons: Looking over this record from the Santa Fe Railroad, I notice that the highest monthly pay during any month is \$424.73, your Honor. So, with that in mind——

Q. (By Mr. Emmons): Mr. Graham, would you consider that to be the highest monthly pay that you received during that time?

A. No, I have made far more than that.

Q. You feel that you have?

A. There were days we doubled and run up to \$450, \$500, \$550.

Q. Well, would that be your earnings during that period?

A. That's right, per month. I don't say that I done that in 1945, but while I was in freight service, I have went way over that.

(Testimony of George H. Graham.)

Mr. Baraty: Well, we are only concerned——

Mr. Emmons: Just a moment, counsel.

Mr. Baraty: Well, we are only concerned with 1945, when he was working for this company.

Q. (By Mr. Emmons): Just during the period, Mr. Graham, of the time that you worked for the Santa Fe Railroad Company, not in your prior experiences as a railroad man. Just during the period that you worked—you started in 1943, didn't you? A. Forty-three.

Q. Well, what was the highest you ever made per month for the Santa Fe Railroad?

A. Well, down there at Blythe, I probably made \$550, close to \$600. [48]

Q. That is for one month's earnings?

A. That was on that local there, and that was sixteen hours a day and overtime.

Q. That was during the war?

A. During the war.

Q. Now these figures, you have had an opportunity to look at this, have you? Do they represent the figures for those months in 1945?

A. Well, I couldn't accept those figures.

Q. You don't think they are correct?

A. No, I don't think they are correct.

Mr. Emmons: Well, we will be unable to stipulate to these.

Mr. Baraty: We will have to bring in the pay officer.

(Testimony of George H. Graham.)

Q. (By Mr. Emmons): What would be your best recollection, Mr. Graham, as to the amount that you made——

Mr. Baraty: Now, if we are going to have that, we ought to have written documentary evidence. Otherwise, it is calling for hearsay testimony. These pay sheets are the best evidence of the man's pay; he wouldn't accept our evidence. Now we will have to insist that he produce his written evidence, documentary evidence.

The Court: Well, if he has any, you can ask him.

Q. (By Mr. Emmons): Do you have any receipts or anything representing pay received from the Santa Fe Railroad?

A. No, that was all burnt up in a fire in January, 1945, in [49] Needles.

Q. I see. Well then, what is your best recollection then as to the amount that you earned?

Mr. Baraty: Well, your Honor——

Q. (Continuing): ——per month?

Mr. Baraty: I don't think we are entitled to go back before January of 1945. This accident happened in July of 1945, and I think it is customary to take the current year, if we have it here.

The Court: Well, I don't think—if it is a question of fact in each year, what is a reasonable period. This is only for the purpose in the event the plaintiff is entitled to recover, of going to the element of damages.

Mr. Emmons: That is true.

The Court: I think that a year, or earnings for a year prior to an accident is certainly not an

(Testimony of George H. Graham.)

unreasonable period. The witness can state what his recollection is if he has no records, and if you have records to show to the contrary, why, you can produce them.

Mr. Emmons: That is my understanding. The plaintiff is entitled to present whatever evidence he can on the subject.

Q. (By Mr. Emmons): What is your best recollection as to the amount of money you earned per month for a year prior to July 5, 1945, while working for the Santa Fe Railroad?

A. Well, I was on the west end at that time, and—— [50]

The Court: Well, just give us the figures.

A. (Continuing): I would say it would run four, four and a quarter.

Q. Four to four and a quarter?

A. Four fifty, yes, after deductions.

Q. After deductions?

A. That is, the deductions taken out of that, see?

Q. Was that gross or take-home pay?

A. Take-home pay.

Q. I see, take-home pay. All right.

A. I believe.

Q. Well, is that your best recollection?

A. My check would run to two and a quarter, and there was deductions of 20% made.

Q. Was that every two weeks?

A. Every two weeks.

(Testimony of George H. Graham.)

Q. Now you notified the defendant in this action that you wanted to restore the \$1050 to them, didn't you?

A. I did what?

Q. That you wanted to restore the \$1050 to them?

A. Oh, yes.

Q. You sent that notice through us, did you not?

A. That's right.

Q. And you never received any answer to that, did you?

A. (No response.) [51]

Q. Now let me ask you this: In 1943, were you involved in an accident with the Santa Fe Railroad?

A. I was.

Q. And what was the nature of your injury at that time?

A. A broken hand.

Q. A broken hand. Is there any question in this particular case as to an injury to your broken hand?

A. No, just a broken hand.

Q. Well, I mean, are you suing in this case to recover any damages for a broken hand?

A. No. I brought action, but I withdrew it.

Q. You withdrew that action? Did you have an attorney representing you?

A. Mr. Thompson in Los Angeles.

Q. And did you ask him to withdraw the case?

A. That's right.

Q. It was dismissed, so far as you knew?

A. Well, they told me it was dismissed. They returned my evidence.

Mr. Baraty: The best evidence is the documentary evidence. Your Honor, that is asking for documentary evidence.

(Testimony of George H. Graham.)

Q. (By the Court): You don't know whether the attorney filed the papers or not in the case?

A. He filed them, your Honor; I asked him to withdraw them, and he gave me my papers back.

Q. You don't know what the papers he filed down there, though?

A. No, he filed them in the Superior Court.

Mr. Baraty: Well, that action is still pending.

Mr. Emmons: Well, that is a conclusion of counsel, and certainly this is no time to present it.

Mr. Baraty: Well, this testimony is a matter of documentary evidence.

The Court: Well, what has this got to do with this matter? We have enough cases to try now without adding one more to it.

Mr. Baraty: It has got something to do with this case; I did not object to it on that ground. It has got something to do with this case, it has something to do with that Rule 304. But my objection goes to this man's testimony now. He is talking about something that is a matter of record.

The Court: Yes.

Mr. Baraty: Documentary record, documentary evidence. If he wanted to dismiss that case, he ought to say so, so we could get it under oath.

The Court: Well, he has in effect said that. I will undertake to clear this up so that we won't waste too much time on it.

Q. (By the Court): You say you directed your attorney to dismiss that action? A. I did.

Q. When? [53]

A. Oh, it would be October, November of 1944.

(Testimony of George H. Graham.)

Q. And so far as you are concerned, you consider that you have withdrawn your claim?

A. Do I what?

Q. Do you now withdraw the claim and ratify whatever you told your attorney at that time to do in that regard?

A. That's right. I told him to withdraw from it and let the thing drop.

Q. And you consider that that case is withdrawn, and you are not asserting any claim under that case now?

A. That's right.

The Court: Now I undertook to do that, counsel; I assume that that is correct, and that you have something.

Mr. Emmons: That was the only information I had about it. It came to our attention this morning by virtue of the opening statement, and we had no thought about the hand injury whatsoever.

Q. (By Mr. Emmons): Now, Mr. Graham, you went to work for the Santa Fe Railroad in 1943?

A. That's right.

Q. And at that time did they give you a book of rules?

A. Yes, sir.

Q. And are you familiar with Rule 304?

A. I am.

Q. And at the time that you went to work for the Santa Fe [54] Railroad, was there any notation in your book that Rule 304 had been abrogated and was no longer in effect?

A. No, no.

Q. Did anybody tell you anything along that line?

A. No.

(Testimony of George H. Graham.)

Q. Did you have to study those rules before you went to work for the Santa Fe Railroad?

A. We had to write a book—contained all the rules.

Q. And was that one of them?

A. That was one of them.

Q. Now has there been an occasion, or have there been occasions, when one of those rules in that rule book have been modified or changed, that you know of? What is the procedure under those conditions?

A. Well, if a rule has been changed, they put a bulletin out. Well, I never have seen a bulletin to that effect, that that rule has ever been altered.

Q. Well, now, what is the general practice when a rule has been changed? They put out a bulletin, and then what happened to the rule book?

A. Well, they don't call them in. When a book comes in to the office again, they will open it up and paste a piece of paper across that rule.

Q. What about this bulletin now. Where does the bulletin come from? [55]

A. It comes from the superintendent's office, the trainmaster.

Q. And is that directed to the attention of everybody? A. Yes, that's right.

Q. Did you ever read such a bulletin in regard to Rule 304? A. Never did.

Q. Did you ever have any knowledge, if it was, that Rule 304 was abrogated or no longer in use?

A. I never heard of it.

(Testimony of George H. Graham.)

Mr. Emmons: Now, for the purpose of the record, your Honor, I would like to read into evidence Rule 304 of the Company Rules.

Mr. Baraty: We object to it on the ground that that rule was not in force at the time of this accident.

Mr. Emmons: May I have that objection?

Mr. Baraty: It is objected to as immaterial.

Mr. Smith: Page 34.

Mr. Baraty: We will be prepared to show that rule was abrogated in 19——

The Court: Well, you may do that, of course.

Mr. Emmons: Reading from the Rules and Regulations of the Operating Department of the Santa Fe Railroad, Rule 304 states as follows (reading):

“If employees are injured in any manner while in the service of this company, they will not be allowed to return to the service of the company [56] until they have executed a release or made satisfactory settlement with the proper officer and secured from him a clearance on account thereof; and the fact of employees re-entering the service of the company in any capacity after being so injured shall be taken and construed as a release of any or all claims of damage which they may have or claim to have against the company on account of such previous injuries, the re-employment of them by the company being acknowledged to be sufficient consideration for such release, notwithstanding they might not have received other compensation than such re-employment.”

(Testimony of George H. Graham.)

Mr. Baraty: Now, we ask that counsel read the date of publication of that book.

Mr. Emmons: Let's see—

Mr. Baraty: Right in the front.

Mr. Emmons: This is revised in 1927.

Mr. Baraty: That is what I wanted you to read.

Q. (By Mr. Emmons): Now this book that I have just read Rule 304 from, will you look at that and tell the jurors whether or not that is the rule book which was given to you, or a similar one, which was given to you as a guide in your operations of trains (handing to witness)?

A. Yes, that is identical, as far as I can see.

Q. Are those the rules, Mr. Graham, which the company required you to take an examination about? [57]

A. That's right.

Q. And you were examined on those rules, is that true?

A. Yes, sir.

Mr. Emmons: Would you like to adjourn at this time, your Honor?

The Court: Well, let's run a little longer. Have you finished the direct examination? Let's continue on for a while.

Mr. Emmons: I have some other rules that I would like to read into evidence, if I may, at this time.

The Court: Very well.

Mr. Emmons: Reading from the Rules and Regulations of the Santa Fe Railway Company, the Operating Department, Rule 93—

Mr. Baraty: We have no objection to that going into evidence.

(Testimony of George H. Graham.)

Mr. Emmons: Rule 93 reads as follows (reading):

“Stations having yard limits will be designated by special rules and timetables. Within yard limits, all trains and engines may use main tracks, not protecting against second or third class trains or extra trains, but will give way as soon as possible upon their approach. All except first class trains will move within yard limits at restricted speed. The responsibility for accident with respect to second or third class or extra trains rests with the [58] approaching train.”

Will you stipulate, counsel, that Rule 153 is of the same substance?

Mr. Smith: Yes, that's right.

Mr. Emmons: So that there are two rules which cover the restricted speed and the responsibility of the approaching train.

Mr. Smith: They cover substantially the same thing.

Mr. Emmons: Now reading from Rule 301-A of the Rules, the Santa Fe Rules and Regulations——

Mr. Baraty: Let me see that one moment, please.

(Conversation among counsel outside the hearing of reporter.)

Mr. Baraty: Well, in the interest of time, you may read them. If we have any objections, we will make them later.

Mr. Emmons: Rule 301-A is as follows (reading):

(Testimony of George H. Graham.)

“The Chief Surgeon, with approval of the General Manager, will issue rules governing physical examinations.”

Rule 301-C is as follows (reading):

“Employees who have been disabled by reason of accident or disease which predisposes them to sudden incapacity, or whose sight, color, sense or hearing has thereby become affected, must pass a satisfactory examination before resuming duty.”

Mr. Baraty: I don't think that rule is material in this [59] case.

The Court: No, I don't see the materiality of that.

Mr. Baraty: I object to it on that ground.

The Court: What do you have in mind, counsel?

Mr. Emmons: I think it will be connected up later.

The Court: Well, is there any point raised that plaintiff is in that category, that any of his senses were affected? What is the point of it?

Mr. Emmons: No, the point is this: The issue is raised here that the plaintiff had independent physicals. Now he was sent and ordered to go to the various hospitals and doctors that he went to by reason of the rules. He had no alternative. He had to go and see them.

The Court: I don't see the applicability of this last rule that you have just read. What is the relevancy of that to this case?

Mr. Emmons: That has to do with what doctors

(Testimony of George H. Graham.)

prescribed with respect to a man whose hearing is affected. In this case, this man was given a release by Dr. Morrison restoring him to full duty.

The Court: Yes?

Mr. Emmons: He wasn't able to return to full duty, and we want to show by this rule that he had to be subjected to such an examination before he could return to duty.

Mr. Baraty: I don't think that rule applies here, but—— [60]

The Court: Well, if you think it has some materiality, let it stand.

Mr. Emmons: It has some materiality. As it stands now, your Honor, it might not be so plain to see, but it will be.

The Court: All right.

Mr. Emmons: Rule 301-F reads as follows (reading):

“Physical examinations must be made by designated physicals.”

Now the examinations which he had were made by designated company physicians.

Q. (By Mr. Emmons): Now, Mr. Graham, have you received a bill from Dr. Fenlon for services he performed? A. Have I what?

Q. Received a bill for the medical services.

A. Well, I paid him some money, or my wife did. But I owe him some.

Q. About how much do you owe?

A. Oh, maybe two hundred fifty, a little more or less.

(Testimony of George H. Graham.)

Mr. Baraty: Well, I think that we ought to have a foundation.

The Court: Yes.

Q. (By the Court): He wants to know, is this doctor who sent you a bill for services or who made some charge?

A. Yes, he made some charge.

Q. Well, did he give you a bill in writing? [61]

A. No.

Q. Well, how do you know how much he charged?

A. I asked him one day about what my bill was.

Q. What?

A. And he says, "Oh, maybe \$250. But don't worry about it. When you get on your feet, why, pay me."

Q. (By Mr. Emmons): Now, other than Dr. Fenlon, have you been to see any other doctor?

A. Only Dr. Niemand.

Q. And is that Dr. Frederick Niemand of this city?

A. That's right.

Q. Whose offices are at 450 Sutter?

A. Yes, sir.

Q. And did Dr. Niemand take X-rays of you?

A. He took X-rays.

Q. When did he take these X-rays?

A. Well, it must be the later part of September or October, 1946.

Q. I see. And did Dr. Niemand tell you you had an injury other than those discussed at the

(Testimony of George H. Graham.)

time you talked with Dr. Morrison?

Mr. Baraty: Now, your Honor, that calls for——

A. Yes, he told me.

Mr. Baraty (continuing): That calls for hearsay, and no foundation. [62]

The Court: Yes, I will sustain the objection.

Q. (By Mr. Emmons): Now, did you learn from Dr. Niemand that you were injured?

A. I first learned from Dr. Fenlon.

Mr. Baraty: Same objection to that, your Honor; it is leading and suggestive, no proper foundation laid for it. Also, it calls for hearsay testimony.

The Court: Yes. Is this doctor going to testify?

Mr. Emmons: He is going to be here.

The Court: Then you can cover that through him.

Q. (By Mr. Emmons): Has Dr. Niemand as yet rendered a bill for services?

Mr. Baraty: Well, we will object to that as incompetent, irrelevant and immaterial. This doctor was not called, as I understand, ever to take care of Mr. Graham, but to be prepared to testify in this case. It is not material to the issues. It is not within the issues of the pleadings.

The Court: Well, I think counsel is correct there. I will sustain the objection. [63]

Q. (By Mr. Emmons): Mr. Graham, I neglected yesterday to ask you what your age was.

A. Fifty-one.

Q. Fifty-one. And what is the date of your birth? A. 1897.

(Testimony of George H. Graham.)

Q. And the date and month?

A. August 1st.

Q. Also, I neglected to ask you yesterday, at the time you offered to return the \$1050 to the defendant railroad, did you have that amount of money to repay them? A. I did, yes.

Q. And was that offer made in good faith?

A. It was.

Mr. Emmons: No further questions, your Honor.

Cross-Examination

By Mr. Baraty:

Q. Mr. Graham, where were you born?

A. In Dickinson, Texas.

Q. What is the name of the place?

A. Dickinson. [64]

Q. How do you spell it?

A. D-i-c-k-i-n-s-o-n.

Q. What county is that in?

A. Galveston County.

Q. That is near Galveston, isn't it, Dickinson?

A. Twenty miles from Galveston.

Q. Twenty miles. Now where do you live?

A. At this time?

Q. If you please, yes.

A. Searchlight, Nevada.

Q. And the address there? A. Box 66.

Q. Post Office Box 66. And at the time of this accident, on July 6, 1945, where did you live?

A. Lived in Needles, but I still had a home up there in Searchlight.

Q. Needles, California? A. Yes, sir.

(Testimony of George H. Graham.)

Q. Did you have an address at Needles?

A. Well, called it the Barnham Courts.

Q. Barnham Courts?

A. (Shook head in the affirmative.)

Q. And did you live there with your family?

A. No.

Q. What did your family consist of at that time? [65]

A. Well, I have three children in Mexico City.

Q. You have—

A. By a former marriage.

Q. How old are they?

A. Well, one is about seventeen, and fifteen and fourteen.

Q. Oh, you have three children? A. Yes.

Q. They are all in Mexico? A. Yes, sir.

Q. With your former wife?

A. Former wife.

Q. Now what was her name? A. Maria.

Q. Maria? A. Yes.

Q. That was her given name?

A. That was her given name.

Q. Now then, you entered into your present marriage—— A. How's that?

Q. When did you enter into your present marriage?

Mr. Emmons: I will object to that as being incompetent, irrelevant and immaterial, your Honor. It has no bearing upon the issues of this case.

Mr. Baraty: Well, he said he is married. Let's find out about it. We are entitled to know that. [66]

Mr. Emmons: Incompetent and irrelevant.

(Testimony of George H. Graham.)

The Court: What is the bearing upon this accident?

Mr. Baraty: Well, it may and it may not be.

The Court: The wife is not making any claim, is she?

Mr. Baraty: No, the wife is not making any claim, but there has been testimony here on direct examination that his wife has taken him here, there and elsewhere; I would like to know the circumstances. I think we are entitled to it.

The Court: Well, your question was, when was he married.

Mr. Baraty: Yes.

The Court: Well, what difference would that make?

Mr. Baraty: Well, it might have some bearing to the other situation.

The Court: I don't think we are here to speculate about those things. If you make a representation that when the man was married will have some definite pertinency to the facts of this accident, why, I will accept your statement of that, but off-hand, I wouldn't think it would have any. It wouldn't even make any difference if he wasn't married. What has that got to do with the cause of action here?

Mr. Baraty: It goes to the matter of his veracity, if he wasn't married, on cross-examination.

The Court: Well, I shall sustain the objection unless there is something more persuasive.

Q. (By Mr. Baraty): What is the given name

(Testimony of George H. Graham.)

of your present wife? [67] A. Sally.

Mr. Emmons: Same objection.

The Court: Well, I will overrule the objection on that.

Q. (By Mr. Baraty): What is the name, please?

A. Sally.

Q. How do you spell it? A. S-a-l-l-y.

Q. Sally. And did you maintain a residence at Searchlight, Nevada, with your wife, Mrs. Sally Graham, at the time? A. I can't hear you.

Q. At the time of this accident—you didn't hear me?

A. I didn't hear all the question.

Q. Oh. Did you have a residence at Searchlight, Nevada, with your wife, Mrs. Sally Graham, at the time of this accident, July 6, 1945?

A. No, but I had an old cabin up there in Searchlight when I was looking the country over.

Q. Well, did Mrs. Sally Graham live there and you live in Needles?

A. She was the Postmistress there at the time, and I married her after the accident.

Q. You married her after the accident?

A. That's right.

Q. How soon after the accident?

A. Well, in December. [68]

Q. December of 1945? A. Forty-five.

Q. Where did that marriage take place?

A. In Quartzite, Arizona.

Q. How do you spell that?

A. Q-u-a-r-t-z-i-t-e.

(Testimony of George H. Graham.)

Q. Arizona. What county is that in?

A. I think that is Yuma County.

Q. Yuma. Now, sir, how long have you been in the railroad business?

A. Well, I started along about 1919.

Q. Started when? A. About 1919.

Q. What was your first railroad job?

A. On the I. & G. N.

Q. What does that mean? A. How's that?

Q. What is the name of that?

A. International and Great Northern.

Q. International and Great Northern. Where?

A. San Antonio, Texas.

Q. San Antonio. And how long were you with that company? A. Oh, about a year.

Q. As a brakeman?

A. As a brakeman. [69]

Q. Has your experience, then, with railroads, been limited to a brakeman's job?

A. Well, brakeman and switchman, engine foreman.

Q. Switchman, flagman? A. How's that?

Q. And flagman? A. And flagman.

Q. Yes. Now, did you have any other railroad experience?

A. Yes, I went over to the G. H. & H. at Galveston.

Q. That is the Galveston, Houston and Henderson? A. That's right.

Q. Runs out of Galveston?

A. Well, it runs to Houston.

(Testimony of George H. Graham.)

Q. And how long were you there?

A. About two years.

Q. What years?

A. Oh, twenty-one and twenty-two.

Q. Then the next railroad experience?

A. The Port Terminal at Houston.

Q. Port Terminal at Houston?

A. That's right.

Q. In the same capacity?

A. As switchman, engine foreman.

Q. And how long were you there?

A. About a year. [70]

Q. One year. And then again, what followed with railroad experience? A. How's that?

Q. What was your next railroad experience?

The Court: Mr. Baraty, he seems to be a little bit hard of hearing. Maybe if you would come up here, it would save repeating the questions.

Mr. Baraty: Yes, thank you very much. I thought I had a voice that was unduly rough.

The Court: No, I think you speak rather softly.

Q. (By Mr. Baraty): Tell me, when were you with the Port Terminal at Houston?

A. In forty-two.

Q. In forty-two. And then after that?

A. I came to the Santa Fe at Needles.

Q. In Forty-three? A. Forty-three.

Q. So the gap of twenty years between the G. H. & H.—you were not employed in the railroad business? A. No.

Mr. Emmons: I think you have omitted the

(Testimony of George H. Graham.)

third one, the Port Terminal at Houston, Texas, counsel. You didn't ask him for the years.

Mr. Baraty: Yes, I asked him; he said forty-two, Mr. Emmons, if I am right. [71]

Mr. Emmons: That's right, I am sorry.

Q. (By Mr. Baraty): That was in forty-three, is that right? A. That's right.

Q. And then the Santa Fe in forty-three?

A. That's right.

Q. So for approximately twenty years, between 1922 to 1942, you were not engaged in the railroad business, were you? A. No.

Q. What did you do, what type of work?

A. Well, I was in Tampico, Mexico, in the oil business.

Q. In the fields drilling?

A. Drilling and contracting.

Q. Manual labor? A. Oh, yes.

Q. Now, did you ever work for the Santa Fe before your employment in the year 1943?

A. No.

Q. Did you ever work for the Atchison, Topeka and Santa Fe in the year 1916 or thereabouts? A. No.

Q. Did you ever work for the Atchison, Topeka and Santa Fe in the year 1916 or thereabouts out of Needles, California? A. No.

Q. Did you ever work for the Southern Pacific Railroad Co.?

A. I worked for the Southern Pacific in El Paso, Texas. [72]

(Testimony of George H. Graham.)

Q. And when was that?

A. Oh, that was in the latter part of twenty-two.

Q. How long was that?

A. Oh, I wasn't there a month?

Q. Just one month. As a brakeman?

A. No, it was a switchman.

Q. As a switchman. Will you pardon me? I get those employments confused.

Now, on this particular job that you had at the time of the occurrence of this accident on July 6, 1945, your job with the Santa Fe was—you tell me what it was. A. As a flagman.

Q. Flagman. And is that in the category of a—I will get it right—brakeman?

A. It was a brakeman, but it is the customary thing with the rear man, what they call the rear man, is a flagman. He is a brakeman, but in the capacity of a brakeman, and he is the flagman at the same time.

Q. The flagman takes care of the rear end of the train? A. That's right.

Q. Now, you left Needles, California, to go east; that is, the direction of Seligman, Arizona, I suppose, on, I guess it was the 4th of July?

A. We did leave on the 4th of July.

Q. And so I am directing your attention to the day that you [73] went back East, before coming back toward the West.

A. That's right.

Q. And that day when you left Needles, the 4th

(Testimony of George H. Graham.)

of July, were you in good health? A. I was.

Q. Through and through?

A. Through and through.

Q. You are not affected with any nervousness or dizziness or anything? A. No.

Q. Or any injuries to any of the muscles or bones of your body? A. No.

Q. All right. So that at Seligman, you spent the night of July the 4th, so that you would come back on the 5th of July toward Needles, toward the West, right? A. That's right.

Q. On that job, you left Seligman, Arizona, at what time, about, on the 5th of July?

A. 11:00 o'clock in the morning.

Q. About 11:00 o'clock in the morning. And of course, it was a hot, sunny day?

A. Well, the weather was clear.

Q. Yes. Well, maybe it wasn't too hot, because you are used to it. It might be to me. But at any rate, what was it, [74] 150 miles or thereabouts?

A. 154, or fifty-three, to be exact.

Q. Well, I wasn't holding you to the exact mileage. Any way, everything went along satisfactorily, and the train got into the yard limits of Needles, California, along about one o'clock in the morning of the next day, which would be July 6, 1945?

A. That's right.

Q. And did you stop along the road at all? I mean, did the train stop from Seligman to Needles that day? A. All day long?

Q. Were you switching cars? A. No.

(Testimony of George H. Graham.)

Q. Taking on cars? A. No.

Q. You just brought this train of 70 odd cars from one destination to another?

A. (Shook head in the affirmative.)

The Court: You will have to answer, because the reporter can't get your answer if you just nod your head.

The Witness: Oh, I see.

Q. (By Mr. Baraty): Now you had made that trip, I assume, many times before?

A. I have.

Q. Was that a regular run for you, or were you in what is called "on the board"? [75]

A. That was a pool job, and I was on a regular run.

Q. And when you say "pool," what do you mean? A. Well, a pool——

Q. You have got to wait until your name comes up and all the men are in a pool?

A. All the men are in a pool, and work first in and first out.

Q. Now then, this diagram which might be hard for me—I am not criticizing except that I am criticizing myself—it might be hard for me to understand. So if I am in error, don't hesitate, Mr. Graham, to point it out. At this time, we have the south at the top. And to the west—I am going to take the liberty of putting a "W" over here, which indicates "west," is that right?

A. That's right.

Q. And I still do the same over here, I will

(Testimony of George H. Graham.)

take the liberty of putting an "E," which means "east." Mr. Emmons has properly designated the north at the bottom. Now there is a passenger, a west-bound passenger, track that runs in as you approach Needles, is there not?

A. There is.

Q. And that west-bound passenger track goes right into the station with passenger cars?

A. That's right.

Q. And at some place along the line before you approach Needles, why, freight cars leave that west-bound main line, to go into [76] the freight yard in the freight yard limits, and then to go into the tracks where they ultimately are deposited for unloading?

A. Yes, they head in way down there on the east end. There is a long lead that comes into No. 20 track.

Q. Yes. Well, there is a long lead. Now by lead, you mean there is a track, this No. 20 track, somewhere beyond the limits of this board in the eastern direction, comes off the passenger west-bound track, doesn't it?

A. Way down below.

Q. Way down below. In other words, you can't get on this No. 20 track, which is a freight track, unless you come off the west-bound passenger main?

A. Well, in other words, you have to come off the west-bound.

Q. Yes. Now, can you tell us what your understanding is of a "lead" track?

(Testimony of George H. Graham.)

A. Well, it is an extension of a track heading into a yard or leading off anywhere along a track, going off in another direction. We call that a lead. But generally, a lead is down a track where all the other switches branch off it.

Q. That is what I was going to say. In other words, from No. 20, there are many other tracks—19 here, 18, 17, 16, off of which cars are put or deposited—or, as you say, spotted?

A. Spotted, that's right. [77]

Q. In other words, a lead track isn't a track where a train stays permanently? A. No.

Q. No. So that your train of—how many cars did you say? When you got on the train, that is?

A. I would gather we have about 70.

Q. About 70 cars. And do they average about forty or fifty feet?

A. Forty, no less than forty—up to fifty.

Q. Well, that might be what, about three hundred feet from the engine to the caboose, or something like that?

A. Oh, longer than that.

Q. Well, my mathematics may be very poor, but will you wait until I—70 cars at forty. I should say I was wrong. About three thousand feet, would it be? A. Yes, a long ways.

Q. Yes. Well, I am glad I put it down here, anyway. So the caboose, when the train came to a stop on No. 20, the lead track, was about three thousand feet away from the—I am not holding you to that number of feet, but I just want to

(Testimony of George H. Graham.)

show the general distance—from the engine, right?

A. It would be, well—if it was 70 cars, it would be a long ways up to the engine.

Q. Yes. Now, how far was the caboose from the switch when it came to a stop? How far was it away from the switch on the [78] west-bound passenger main track?

A. Oh, Lord, we were probably a mile; it is a long, long track.

Q. Well, was it longer than the distance from your caboose up to your engine? A. Oh, yes.

Q. I see. All right. Now, when you came into Track 20, your train finally stopped, did it?

A. It did.

Q. It stopped. And it was stopped for how long, sir?

A. Oh, about thirty minutes, about.

Q. Before this accident?

A. About thirty minutes.

Q. About thirty minutes. Now what did you do as flagman on that train from the time you stopped until the time of this accident?

A. Oh, we pulled into 20, and I waited a little while, and I saw we wasn't going in, so I took down my markers, put them away, and crawled up in the cupola.

Q. Can I interrupt you? You gave me a thought there that I wanted to mention. You say you hauled down or pulled down your markers. Will you explain to the jury and to me what a marker is?

A. A marker is two lamps on either side of

(Testimony of George H. Graham.)

the rear of the caboose. When they are turned one way, they are red, and when they are in the clear, or the main line, or in a passing track, [79] you turn them and they are yellow. Without a marker, there is no train; but when those markers are up, then it is a train, if it is only an engine. If that engine is alone and single and has markers on it, on the back of it, it is then a train. Or it could be 5,000 cars, but if there are markers on the caboose behind it, it could be a train. But without markers, it is nothing.

Q. All right. Without markers there is no train?

A. There is no train.

Q. Now on markers, a marker is a kind of lamp, isn't it?

A. It is a lamp.

Q. A kerosene lamp?

A. Well, we burn a composition oil in there.

Q. Yes. It doesn't work by electricity on freight trains?

A. Oh, no, no.

Q. And its size is what, about a foot high?

A. About that high (indicating).

Q. About two feet or a foot and a half. And it fits in a slot?

A. In a slot.

Q. On the rear of each side of the train?

A. That's right, there are little slots up there, and you would sit them right (indicating).

Q. And that is, you turn it so that it has three types of colored lens, don't you? [80]

A. Well, you have got two colors—yellow and red.

Q. Don't you have a green?

A. No, no.

(Testimony of George H. Graham.)

Q. You don't have a green? A. No.

Q. All right. Now, as you came into the yard limits there, or as you came in on No. 20 off the west-bound passenger main, what did these markers, what color did these display?

A. I had them turned yellow.

Q. You had them turned yellow?

A. After I got off the main line.

Q. What were they on the main line?

A. Red.

Q. They were red. And when did you turn them yellow?

A. When I got in the clear on the long lead, heading in.

Q. When you got off the main line and went on No. 20?

A. That's right—no, coming in off the long lead. We hadn't reached No. 20 yet.

Q. There is another one: what do you mean by "long lead"?

A. Well, that long lead from this switch, No. 20 there. It goes back there for a mile, where you head off the west-bound main line.

Q. And you were coming into the yard limits then?

A. We were coming into the yard limits, and we were in the yard limits. [81]

Q. Where is the yard limits with reference to the place where this car had stopped?

A. East of that east switch, the head end switch.

Q. Now, was it then after you had come off the

(Testimony of George H. Graham.)

west-bound passenger main that you turned the red to the yellow? A. That's right.

Q. And they were displaying that colored yellow light when you went back on the platform and took them down?

A. They were still displaying yellow.

Q. Yes. And you took them down, did you?

A. Yes, I took them down after we went in No. 20.

Q. With the result that there was no train there at all, as far as railroad men knew?

A. We were through.

Q. Yes? A. Practically through.

Q. Now, how much further was it that this train had to go before it got to a siding where it was deposited for the rest of the night, or until it was unloaded or moved again?

A. Well, it would have to head into the other yard. I would say maybe a half mile, or it might be a mile.

Q. A mile ahead of the engine?

A. Well, you have got to head up and go right into the train yard.

Q. So you were there that half hour with no markers displayed? [82] A. How's that?

Q. No markers displayed for half an hour?

A. No.

Q. Now, what did you do after you took the markers off?

A. I crawled up in the caboose, in the cupola.

Q. You went up the ladder to the place where

(Testimony of George H. Graham.)

this seat was that was assigned to you as flagman?

A. Yes; that's right.

Q. On the right-hand side of the train looking forward?

A. That's right.

Q. The same side as the engineer?

A. That's right.

Q. And what were your duties up there at that time?

A. Well, I just was waiting to be pulled into the yard.

Q. Well, were you awake or asleep?

A. Oh, I was awake.

Q. One o'clock in the morning, half-past one, but you were not doing anything up there?

A. No.

Q. Well, now, as you sat up there, what drew your attention to something out of the ordinary, if anything?

A. Well, I seen a reflection. I looked back, I thought maybe there was a train coming down the main line, on the west-bound main line, and it kept coming and I swung around, I could see it was in behind those outfit cars. Then I knew [83] there was another train or something coming in there.

Q. What side of the caboose? Now, I understood that you depicted this as the caboose, and I think here on the right-hand side, as you looked toward the west would be about your position. Now where are these outfit cars that you talk about?

A. Where that short line is up there.

Q. Number 19?

(Testimony of George H. Graham.)

A. No, east of that. That little short line (indicating).

Q. Over here? A. Yes.

Q. Way in the back. Well, that would still be, that would be to the south of your train, wouldn't it? A. No, it would be east.

Q. Well, here's your track here, 20, and if this short line here is what you and I understand each other to mean, it would be south of 20, wouldn't it?

A. It would be south of the long lead there.

Q. Yes. A. Yes, that's right.

Q. And it would be east, of course, of your——

A. That's right.

Q. Of your caboose's position. Now you saw a reflection from a headlight? A. That's right.

Q. Was it shining on your caboose? [84]

A. Oh, you could see the reflection, see it shooting way up the river. That is what drew my attention to it. I turned around.

Q. Oh, it wasn't in a straight line then, like this No. 20 is on this blackboard; it was shining over here into the river?

A. Like that, as it was coming around the curve.

Q. It was shining to the north, because it comes around a curve on the on the other end of this blackboard, doesn't it? A. Yes.

Q. It starts to curve from the south?

A. It was just a long curve there.

Q. A long curve from the south?

A. From the east.

Q. It is from the south-east?

(Testimony of George H. Graham.)

A. No, from the east.

Q. From the east.

A. Coming down the long lead.

Q. So at the time you came around the curve, the light of the engine shown into the river. All right. Well, now, how long was it before that engine collided with your caboose? How much time?

A. From the time I first saw it?

Q. Yes, sir; from the time you first saw the light. A. Oh, about two minutes.

Q. Two minutes. Now what did you do, then, when you saw [85] this light on this approaching engine?

A. Well, I stuck my head and shoulders out the window and my electric lamp, railroad lamp, and he kept coming and I swung him down (indicating). There was no answer, and I got down and went back on the rear platform, and by that time he was pretty close to me.

Q. Well, you were sitting up here in your place on the right-hand side of that cupola there, with your back toward the oncoming engine—that's right, isn't it? A. That's right.

Q. And now did you look back to see what it was when you saw this light?

A. Sure, certainly I looked back. I stuck my head and shoulders out the window.

Q. Looked back out the window like this (indicating)? A. That's right.

Q. And then you gave this type of a sign (indicating)?

(Testimony of George H. Graham.)

A. Out the back of the caboose, like that.

Q. Well, you were on the side of the——

A. Well, yes, I can reach around.

Q. Oh, reaching around in back?

A. In back of the cupola.

Q. I see. Now, were you looking back, then, to see if there was any response?

A. Yes, I was watching. [86]

Q. And you got no response?

A. There was no response.

Q. All right. So then what did you do?

A. Well, I got down out of the cupola and walked to the back platform.

Q. Now, you came down the stepladder, the grabirons there?

A. The ladder, grabirons there.

Q. There are about four of them there, aren't they?

A. Oh, on some of them there's three, some four, some five.

Q. I think you said yesterday that the floor of the cupola was about five or six feet above the floor of the caboose proper?

A. Well, the platform used to be just about my chin.

Q. Well, then it is about five feet, then. All right. You came down the ladder into the isleway there under the cupola, huh?

A. That's right.

Q. And then what did you do?

A. Well, I went back to the platform, the rear platform.

Q. You went back to that platform, and there is a regular platform there with a railing?

(Testimony of George H. Graham.)

A. That's right.

Q. And steps on each side that a man can use to go down to the ground?

A. That's right. [87]

Q. Well, what did you find when you got down there, and how did you view the situation?

A. Well, I saw he was getting pretty close to me, and I didn't even have time to get a fussee out and bust that, and I looked at the river and I didn't want to jump that way, and I looked at the other side and there was a pile of ties all strewed up and down between 19 and 20 tracks, so I thought pretty quickly. I said, "The safest place for me is in the cupola, and then if he hits, I can get out of the window."

Q. So what did you do then?

A. Well, I made a jump for the steps going up and got up there and was just crossing over to get on my side when they hit. That is about the end of it.

Q. That crossing-over is about the size of one of these squares here in the courtroom?

A. No—well, a little wider.

Q. About how many feet would you say?

A. I would say three feet or two and a half feet across.

Q. Well, you could step over there without any difficulty; your legs are rather lengthy?

A. Without any trouble.

Q. You could do that all right, couldn't you, under ordinary circumstances?

(Testimony of George H. Graham.)

A. All the time, yes.

Q. Yes. Now to dismount from the position in your cupola to [88] get over to where the steps were, you had to stretch that length of whatever it was, three feet or something, to get over to the ladder and come down?

A. You have to step across to get down.

Q. And you did that and got down safely and went down on the rear platform, and then came back and went up on the ladder. Then you were up on the ladder on the left-hand side, which is the side where the other brakeman sits?

A. It wouldn't be—it would be the left-hand side, east and west.

Q. Yes. Facing forward, toward the forward end. And nothing had occurred up to that moment, had it?

A. No, just as I was stepping across and I passed the place.

Q. And was there another brakeman in that cupola at the time of the crash?

A. I don't remember whether he was up there in the cupola with me or whether he was down, laying down.

Q. His name was Reinhardt, wasn't it?

A. That's right.

Q. You don't recall whether he was up in his seat?

A. I can't. I wouldn't be able to say for sure though.

Q. His designated seat was the left-hand side,

(Testimony of George H. Graham.)

wasn't it? A. Left-hand side.

Q. And do you have any memory of his presence at any place in the caboose at the time of the collision? [89]

A. Well, he was in the caboose.

Q. Where?

A. Well, that I can't tell you exactly. I don't know, I don't remember.

Q. So that in stepping across to go to your place on the right-hand side looking forward, did you get over there before the collision?

A. I think I was just stepping over when they hit.

Q. All right.

A. Whether I got clear over, I can't tell you. It all happened so quickly, I don't just remember.

Q. And when the collision actually took place, what happened to you?

A. Well, it threw me up and jerked loose everything. The car went up an incline, like that (indicating). The caboose did, rather. And I went down to the floor.

Q. You went down to the floor of the caboose?

A. That's right.

Q. What part of your body struck the floor of the caboose?

A. Oh, I struck on my back and hip and the back of my head and shoulder.

Q. And you got up right away, didn't you?

A. I was getting up, trying to get up.

Q. Well, did you get up?

(Testimony of George H. Graham.)

A. I don't know whether I got clear to my feet or not. [90] I can't answer that, because I was groping my way around in the dark there. My lamp was out and my glasses was off somewhere and all of a sudden, down I go again.

Q. And then when you went down the second time, were you back in the isleway in the caboose?

A. Yes, I was.

Q. And did you get up the second time?

A. I got up and slid around and slid down into the doorway and outside.

Q. Got out on the platform and down on the steps?

A. Sliding right out. It was on an angle like that, then (indicating).

Q. Yes. Now, what side of this train did you get out on, this caboose?

A. I got off between 19 and 20 track, on the left side.

Q. That would be on the outside?

A. Outside.

Q. And what is the first thing that—how were you feeling?

A. Well, I don't know; I was feeling pretty well shot all to pieces.

Q. What was hurting you, if anything?

A. I was just numb and terrible pain in my head.

Q. Well, you did develop a bump, a lump on your head, didn't you?

A. On the back of my head here (indicating).

(Testimony of George H. Graham.)

Q. That subsequently disappeared, didn't it?

A. Yes, that has disappeared. The head X-ray I had——

Q. Oh, so do you remember what you did when you got down on the ground?

A. Well, I have a faint recollection. I wouldn't take an oath that I did it or didn't do it. But I think that I had presence of mind to go down and cut a couple of cars off. It was all smashed up and things strewed around there, and I have that recollection. Now whether I did or not, I don't know, Mr. Baraty. I assume I did.

Q. Well, that is the information everybody had, that you did your job and cut off the caboose, and the car that was in front of it. So that from there on, what did you do?

A. Well, I came back to the caboose, and that engineer was there hollering his head off.

Q. Well, what was the engineer hollering his head off about?

A. About the markers being down; I remember that.

Q. Yes. He said something to the effect, "Why didn't you have these markers up here? I didn't know you were here," or something like that, didn't he?

A. I think it was something along that general line.

Q. The discussion got to such a heated point that there was the possibility of a fist fight right then and there? A. No.

Q. Didn't get that far? [92]

(Testimony of George H. Graham.)

A. No, I don't think so; I don't remember that.

Q. Now then, from that point, and after that discussion with the engineer, what did you do from there? What was the next thing you did?

A. Well, I think some one of the engine crew, or somebody, called—they have a station wagon that carries crews back and forth from that east end out there back to the station.

Q. You mean an automobile?

A. An automobile

Q. Yes?

A. Well, I went over to the main line there, and the rest of them came over, I believe, and there was some passenger train came through and stopped right where I was, and there was a vestibule door open, and I crawled on to it.

Q. I forgot to ask you, what was that train stopped there on 20 for, for half an hour?

A. On 20?

Q. Yes.

A. Waiting to get into the yard.

Q. Your conductor was at the head end waiting for directions to deposit his train on one of the final resting places in the freight yard?

A. In the freight yard.

Q. Yes. Now, do I understand you to say, that, after the accident, after you had talked or had a discussion with the [93] engineer, after the two cars had been cut off, that a station wagon took you down to the east end, to the passenger track?

A. The station wagon comes clear up from

(Testimony of George H. Graham.)

the depot.

Q. Yes. That is the west end?

A. Down there. Then it picks up the engine crews and takes them in. That is where they exchange the crews.

Q. Well, what did that have to do with your situation?

A. Well, I didn't go up in the station wagon.

Q. Well, that is what I thought.

A. I crawled on this passenger train. The rest of them come up in the station wagon, as far as I know.

Q. Well now, then, from the end of your caboose, you walked back along 20 on the freight lead to the west-bound main track, did you?

A. I walked over there.

Q. That is over a mile?

A. Oh, three-hundred feet.

Q. I thought you told us a while ago that where you come in off the main line up to the place where you stopped, it was over a mile.

A. It is a mile back to the head end switch, where my caboose was standing; there is your west-bound main line, probably two hundred, two hundred fifty, or so over there, right up where that curve is there (indicating).

Q. Oh, but there is no switch in, at that three hundred feet [94] distance, is that it?

A. No.

Q. Oh, I see. In other words, you left the freight lead and walked across free country, open land?

(Testimony of George H. Graham.)

A. Point to your caboose there.

Q. Yes, sir?

A. And cut right across that curve there.

Q. Oh, you went over these other tracks?

A. I cut right through there.

Q. You cut right through here?

A. Right there. The pointer is right on the west-bound main line.

Q. You did all that in the dark?

A. How's that?

Q. It was dark? A. It was dark.

Q. You didn't have any lantern or light?

A. Lights—oh, I had my lamp.

Q. Did you have your lantern?

A. I found it.

Q. It was working? A. Oh, yes.

Q. You didn't have your glasses on?

A. No, I didn't have any glasses on.

Q. Well, you walked these three hundred feet over these [95] various freight car tracks to the main line? A. I did.

Q. To the passenger line. And you got on the passenger train?

A. There was one just came in there, pulled in there. There was another one ahead of him, and he stopped, and this fellow was on his block, a red block ahead of him, and he had to stop there just for a moment. Then he pulled on into the passenger yard.

Q. Did you get on the train? A. No.

Q. Did you get on the engine, I mean?

(Testimony of George H. Graham.)

A. No, I got on one of the rear cars. I think it was the rear car.

Q. The doors were open? A. Yes.

Q. And you got aboard?

A. Those doors there——

Q. And you got aboard, you got on?

A. I did.

Q. And how far was that to the station?

A. Oh, that is a mile or over.

Q. Oh, so you rode in a mile to the depot at Needles? A. That's right.

Q. Well, what did you do then, sir?

A. Well, I got off and got up to the crew dispatcher, got up [96] to the office, and a bunch of men crowded around me and wanted to know what the trouble was and where the accident was and how about it. I didn't know. I just—then a fellow named Beadle took ahold of me and wanted me to come. He wanted to take me to the hospital.

Q. What is his name? A. Beadle.

Q. What is his capacity?

A. He is the night crew dispatcher there.

Q. He is the night crew dispatcher, and he wanted to take you to the hospital? A. Yes.

Q. The Santa Fe Hospital Association maintains an emergency hospital at Needles?

A. That's right.

Q. That is open night and day, twenty-four hours a day? A. If you can get in.

Q. There are some beds there?

A. Well, yes, there are beds there, but that is

(Testimony of George H. Graham.)

all. I know from experience that you can't get in the hospital unless you have got an amputated leg or something.

Q. There is always a nurse in attendance?

A. There is, but they don't give you any prompt treatment.

Q. And there is always a doctor available in small places like Needles? [97]

A. In emergencies, yes.

Q. At that time you told Mr. Beadle or Beale or whatever his name was, that you didn't want to go to the hospital?

A. I wouldn't go to the hospital, that present doctor down there.

Q. With what?

A. With the doctor they had in charge. I didn't want him to touch me or see me.

Q. What was his name? A. Tyerman.

Q. Did you know he was on duty that night?

A. He was the only company doctor there.

Q. I see. So what was your ailment at the moment?

A. Well, just severe shock and pain, and my back and my hip and my whole leg seemed to be just, well like it was asleep. And my head was busting open with the pain. It might have been from the bump, or whatever.

Q. So did you sign off at the crew dispatcher's office then? A. I don't remember.

Q. You didn't sign what is known as the "law sheet"? A. I don't remember.

(Testimony of George H. Graham.)

Q. You don't remember doing that? Did you tell Mr. Beale, or the crew dispatcher there, or anybody there, or anybody in the office of the railroad company that you were hurt and needed medical attention? [98]

A. Well, everybody knew it. I didn't have to tell them.

Q. Well, did you tell anybody?

A. Well, they could see it.

Q. What?

A. They could see that I was hurt.

Q. Well, did you tell anybody you wanted medical attention?

A. Yes, I think I told Beadle and several around there that I was hurt.

Q. Did you ask them to send you to Los Angeles to the Santa Fe Hospital Association Hospital, there in Los Angeles?

A. Not at that time, no.

Q. You did not? Well, what did you do?

A. Well, there was some man there—I don't remember who he was or what, some railroad man, some brakeman—had his car there. He said, "I will take you home," and he took me over and the car was parked over on Front Street, and I got in and he took me on home.

Q. Now when you say, "home" you mean the bungalow or cottage or court that you occupied?

A. That right.

Q. Did you say on Broad Street?

A. It is the Bonham Courts.

(Testimony of George H. Graham.)

Q. Bonham Courts. That is it. And that is where you lived at the time?

A. I had a cabin there. [99]

Q. Yes. Now did you go to bed that night?

A. No, I don't think so. I think I went right to Searchlight. I was sopped with blood, and I put some adhesive tape up over my eye and got in my car, and I think I went on straight to Searchlight.

Q. Well, then, it must have been what time in the morning, two or three o'clock?

A. Oh, it was maybe two-thirty.

Q. Just two-thirty in the morning. Three maybe.

A. I don't remember that.

Q. Well, it was before daylight?

A. Oh, it was dark.

Q. Yes. And your car was available at your place where you lived?

A. Right alongside the cabin.

Q. Were you in pain then, sir?

A. How's that?

Q. Were you in pain? A. Very much.

Q. Where were you in pain?

A. Right in the back of my hip.

Q. Did you have a headache?

A. Terrible headache.

Q. Were you bleeding?

A. Well, my head wasn't bleeding, but my eye was bleeding, and [100] my head, in the back, felt like I had been kicked by a mule or something.

Q. So you drove to Searchlight, Nevada?

A. I did.

Q. How many miles is that from Needles?

(Testimony of George H. Graham.)

A. Fifty-four.

Q. Did anybody go with you to Searchlight, Nevada? A. No.

Q. What did you go to Searchlight, Nevada, for? A. I went home.

Q. You went home?

A. I went home, to go up there where I had a cabin and get away from Needles.

Q. Did you have——

A. I had no cooling system there in Needles in that cabin, and I did have up at Searchlight, where I could be comfortable.

Q. Well, you had two places of abode, one in Searchlight and one in Needles?

A. I did have.

Q. And you wanted to get away from Needles?

A. Yes.

Q. Was there a doctor at Searchlight, Nevada?

A. No, he was at Boulder City.

Q. And how far is that from Searchlight, Nevada? A. Forty miles. [101]

Q. Another forty miles. There was no Santa Fe Hospital Association Emergency service at Searchlight, Nevada? A. No.

Q. The Santa Fe doesn't go to Searchlight, Nevada? A. No.

Q. It doesn't go to Boulder City, Nevada?

A. No, it doesn't go to Boulder City. No.

Q. Well, now, what was the—did you have any other purpose of going to Searchlight, Nevada?

A. Well, it may have been, I formed a habit,

(Testimony of George H. Graham.)

because I used to go in off the road and go right up there, and then come back and go right out and go to work. It might have been force of habit, but I did not want to go over to that Santa Fe Hospital at Needles.

Q. You made that trip without any trouble that night in the automobile, that fifty-four-mile trip?

A. I got in the car and just went right along. I took my time and got up there.

Q. I see. All right, now, you were up at Searchlight, Nevada, and then what did you do?

A. I went to bed.

Q. Did you take care of yourself?

A. The lady I married did. She took care of me.

Q. Oh. What was necessary for you to have done?

A. Oh, she just took a razor blade and shaved the hair off [102] my eye there and put some adhesive tape there and pulled it together, and I just went to bed.

Q. And you rested that night until when? How long did you stay in bed?

A. Oh, I stayed there in bed, I guess, until around the morning of the 9th.

Q. So you got up there on the morning of the 6th of July? A. Yes.

Q. And you stayed in bed from the time you got up there through the 6th, all day the 7th of July, all day the 8th of July, and now we're in the 9th of July? A. Yes.

Q. And during that time, you didn't seek the attendance of any medical aid of any kind?

(Testimony of George H. Graham.)

A. No, I was able to walk. I could get around, and move around, and didn't want anything to do with that Dr. Tyerman. That was in Needles—please understand me on that—because he was just too much for me, and most everybody else.

Q. Well, please understand me, if you will; I asked you if you stayed in bed on July 6th, 7th, 8th, and the 9th. You went along with me, and you led me to believe that you understood. Now you have just told me that you were up and around. Now can we have the chronology of your——

A. Well, I had to get up to go into the wash-room.

Q. That's right. Well, was that the limit of your physical [103] exertion to go to the toilet or the washroom? A. That's right.

Q. And otherwise, you were in bed?

A. That's right.

Q. So we are agreed on that?

A. That's right.

Q. Up until the 9th? A. That's right.

Q. Until about what time?

A. Oh, I should think we left there about, well, before noon. I can't tell you off-hand.

Q. And all that time you were a member in good standing with the Santa Fe Hospital Association and could demand medical service, if you wanted to, couldn't you? A. I could, yes.

Q. Yes. And so on the 9th of July, 1945, what happened there?

A. Well, I went to Boulder City.

(Testimony of George H. Graham.)

Q. Well, I mean, about what time of day?

A. What?

Q. About what time of day?

A. Well, I would say it was a little before noon sometime. I can't tell you the exact hour.

Q. And you went to Boulder City, Nevada. Now what was the purpose of that trip?

A. To go up and see Dr. Fenlon. [104]

Q. May we have you spell his name?

A. F-e-n-l-o-n.

Q. And his initials, do you know them?

A. R. L.

Q. That is about forty miles away, again, from——

The Court: That has been asked and answered several times.

Mr. Baraty: That's right.

The Court: I wonder whether we couldn't move along a little faster, if you will, Mr. Baraty? I think you repeat the answers and ask the same questions so many times.

Q. (By Mr. Baraty): Did you drive the car or did the lady you subsequently married drive it?

A. She drove it.

Q. Had you been waited on by Dr. Fenlon before? A. No, I hadn't seen him.

Q. I mean, at any time, had he been your Doctor? A. Oh, no, never before that.

Q. Well, you got up there, and what service did he render you, if any?

A. Well, he looked me over and changed the

(Testimony of George H. Graham.)

thing on my eye and told me to go back to bed. He says, "You ought to go up to the hospital."

Q. "You ought to go to the hospital." And so you drove back, or rather the lady drove you back then immediately, I assume, to Searchlight? [105]

A. That afternoon.

Q. That afternoon. Then what went on from there with reference to your ability to get around and your medical attention?

A. Oh, I stayed in bed most of the time, and then I had a big easy chair; I would go out in the dining room and sit in that. And I stayed there at the house until along about the 16th. I got a wire from Mr. Stuppi, the trainmaster, to come in and attend an investigation, and I received that wire along about the 10th.

Q. Yes. Now up to that time, had you again revisited the doctor at Boulder Creek?

A. No, I didn't see him for several days.

Q. Yes?

A. But he come to Searchlight. He owned the house where I was living in there. I rented it from him.

Q. Well, he waited on you from the 9th to the time you received the telegram to go in to Needles?

A. Well, the next day, I got the telegram.

Q. Well, did you go to Needles?

A. I was in Boulder City. The next day was the 10th, and I got the telegram on that date.

Q. Did you go?

A. No, I answered and told Stuppi, the train-

(Testimony of George H. Graham.)

master, that I would get in there when I was able to travel.

Q. When did that ability enable you to go to Needles for the [106] investigation?

A. Well, I managed to get in there on the 16th.

Q. And from the time you saw the Doctor on the 9th at Boulder Creek, had he waited on you up to the time you went to Needles on the 16th of July?

A. No, he hadn't.

Q. He hadn't? A. No, I don't think so.

Q. And how were you feeling during that period?

A. Pretty bad.

Q. Well, what do you mean? Where was the hurt?

A. Well, the pain was in my hip and my back was hurting me rather severe.

Q. Well, did you go to Needles then in response to the telegram?

A. I went down there, and I went to the train-master's office and asked him if he wanted to conduct that investigation, that I was there. I told him that otherwise I would go back home.

Q. All right. And you were driven down by this lady by automobile?

A. That's right.

Q. Did the investigation go on that day?

A. Well, I think that day, but I can't tell you the hour. I don't remember the hour.

Q. Well, it went on that day? [107]

A. Yes.

Q. How long were you at Needles that day?

A. All day.

Q. Did you go to the hospital to receive any at-

(Testimony of George H. Graham.)

tention at the Santa Fe Hospital Association?

A. I don't remember whether I did or not, that day or not.

Q. You don't remember.

Q. (By Mr. Baraty): Was it suggested to you that you should visit the Emergency Hospital at Needles, by anybody in the company, on the 16th of July? A. I don't remember.

Q. Well, you did go to the Emergency Hospital there, didn't you, at Needles on the 17th of July?

A. Around, close around that time I did, but I don't remember the dates. [108]

Q. And who waited on you that day?

A. Well, the day I went into the hospital?

Q. That's right.

A. I think it was Dr. Price.

Q. Dr. Price. And you knew Dr. Price, did you not? A. No, I never met him before.

Q. Well, hadn't he waited on you in April of 1945, when you had a laceration on your upper lip, caused by being struck by a door in a caboose?

A. Well, some doctor took a stitch in my lip, but I don't remember whether it was Dr. Price or who did it; I don't recollect. That is too far back for me to remember and be exact about it.

Q. Well, that was only a few months before July of '45?

A. Well, I remember some doctor stitching my lip up.

Q. Well, Dr. Price took care of you then on the 17th and advised some heat lamp treatments,

(Testimony of George H. Graham.)

and that was all? A. He what?

Q. Some lamp, heat lamp treatments, did he?

A. I don't know whether he gave me any lamp treatments there or not.

Q. Did he advise the application of heat?

A. He may have; I don't remember.

Q. You don't. Well, you weren't put to bed there to remain? A. No. [109]

Q. And where did you go? You know better than I do. Where did you go?

A. I returned to Searchlight after that visit to Needles.

Q. The lady drove you back to Searchlight?

A. (Shook head in the affirmative.)

Q. And it was more comfortable up there than in your place in Needles, was it?

A. Well, the difference between—almost thirty-five hundred feet.

Q. What?

A. It was a difference of about thirty-five hundred feet; it is cool up there.

Q. Oh, you mean elevation? A. Elevation.

Q. Yes, I see. Now did you drive the car back to Searchlight? A. No, she drove it.

Q. The lady drove the car. Now what was the next thing you did with reference to paying attention to your hurts?

A. Well, I saw Dr. Fenlon, I think, sometime in between there, because he came down there to Searchlight, and then in early August, I saw Dr. Holtz again, in Needles.

Q. Well now, let's see. When did you see Dr. Fenlon when he came to Searchlight?

(Testimony of George H. Graham.)

A. Well, that was in between; I visited Needles in, I would say, maybe the 24th, 25th or 26th of July—along in there [110]—I can't be positive of it.

Q. He didn't come there to call on you for treatment?

A. Not personally; he owned that house, and he has property there.

Q. Yes, and he just happened to be passing by? And what did he do for you, sir?

A. Well, he just looked me over again. He said, "You ought to go to the Hospital and get a good checking over."

Q. And he again advised you that you should go to the hospital? A. He did.

Q. And he knew you were a Santa Fe Employee and that you belonged to the Hospital Association?

A. He knew that.

Q. And so did he prescribe anything for you—Dr. Fenlon—at that time?

A. No, he gave me some pills of some kind, pain pills, as he called them.

Q. Did they do any good?

A. Well, I can't say they did.

Q. I see. You didn't take his advice and go to a hospital?

A. I didn't feel like making that trip into Los Angeles. I didn't want to go into the Santa Fe Hospital, because I had an unpleasant—

The Court: Well, you answered the question. I think we will save time if you don't volunteer these answers. [111]

(Testimony of George H. Graham.)

The Witness: Okeh.

The Court: Just answer the question. Counsel, ask him a simple question: "You didn't go to the hospital at that time?"

The Witness: I didn't go to the hospital at that time.

The Court: Ask the next question.

Q. (By Mr. Baraty): Mr. Graham, you didn't have any discussion with Dr. Price when you saw him on the 17th, did you? A. No.

Q. Well then, when again did you seek medical attention after seeing Dr. Fenlon in Searchlight?

A. Well, I saw Dr. Holtz in early August.

Q. Dr. Holtz? A. Holtz.

Q. And is he another doctor connected with the hospital association at Needles?

A. He was a new doctor there. It was the first time I had ever seen him.

Q. And what did you tell him was your—or what were your hurts there when you went in on that day?

A. Well, the same ones I had; severe pains in my back and hip, and my head was still pretty sore.

Q. Did he advise that you go to the General Hospital of the Association at Los Angeles?

A. He did. [112]

Q. And did you go there?

A. Not right then, no.

Q. What date was that, was it the 29th of July or was it the 7th of August, 1945, when you saw

(Testimony of George H. Graham.)

Holtz?

A. I can't tell you the dates. I just don't know. I don't remember.

Q. Well, you didn't go right then?

A. No, I didn't.

Q. Why not?

A. Because I didn't feel like going.

Q. Were you in pain?

A. I was in severe pain.

Q. At that time where was it?

A. In my back and hip.

Q. How about your head?

A. That was plenty sore, aching.

Q. And what did you do after Dr. Holtz directed you to the hospital in Los Angeles, further, about medically taking care of yourself?

A. Well, I think I returned to Searchlight, and then on the 10th, I believe I came in and asked for a pass in to Los Angeles.

Q. You were driven back—were you driven back in the automobile, or did you drive it back yourself?

A. I think I drove it back myself that time.

Q. In other words, when you came to see Dr. Holtz, you drove yourself from Searchlight, you saw the doctor, you got in your machine and drove back to Searchlight?

A. Searchlight.

Q. You doing the driving?

A. Well, I think she was with me when I saw Dr. Holtz.

Q. Well now, we are talking about the lady be-

(Testimony of George H. Graham.)

ing with you; I am asking you who did the driving on that trip.

A. Well, when I came in to go into the hospital, I brought that car in myself.

Q. Yes? A. I left it in Needles.

Q. We are not talking about the same thing. I am asking you about the trip you made when you saw Dr. Holtz and did not take his advice to go to Los Angeles, but went back to Searchlight. I am asking you on that trip, sir, did you drive the automobile?

A. After I saw Dr. Holtz, no, I am pretty sure she was with me.

Q. You think the lady drove; did the lady drive the automobile in that trip?

A. She always drives when I am with her.

Q. I see. So she drove you back? I always do it the other way, but that is the way you did it; all right. When was there next given attention to you for medical treatment? [114] Now you are back in Searchlight.

A. Well, I got a pass and went into Los Angeles on the 10th, I believe, of August.

Q. All right. Now to get a pass to go into Los Angeles, you had to drive to Needles?

A. That's right.

Q. And that time you drove the automobile yourself? A. That's right.

Q. All alone. And you came through to Needles——

The Court: Well, haven't you covered it, Mr.

(Testimony of George H. Graham.)

Baraty, without repeating it so many times?

Q. (By Mr. Baraty): Who did you get the pass from?

The Court: He got a pass and went from there to Los Angeles, so let's go on from there.

Mr. Baraty: You got a train and went to Los Angeles? A. Yes.

Q. Did you go to the hospital?

A. I went out there and didn't and couldn't be admitted.

Q. And you told us yesterday you had to wait three or four days because of the conjection?

A. That's right, that's right.

Q. Finally you got in the hospital, and under whose care were you?

A. Well, Dr. Morrison was the chief surgeon.

Q. And did they take X-rays or what did they do for you [115] generally?

A. Well, they didn't do anything for me generally, just laid some boards out there with a pad on it and told me to lay down on that.

Q. And how long did you stay there?

A. Well, I was in the hospital ten days.

Q. Ten days in Los Angeles?

A. That's right.

Q. And did you get better when you were there?

A. I couldn't see any improvement.

Q. Did the doctors discharge?

A. No, I asked them to give me my clothes, that I wanted to go home. I couldn't stand it down there.

Q. You left? A. I left.

(Testimony of George H. Graham.)

Q. And how did you get back home, or to Needles?

A. Oh, I think I went back on Number 4.

Q. On your pass? A. On my pass.

Q. I see, on your pass. And at Needles, then, what did you do, if anything, to take care of yourself? A. I went right on to Searchlight.

Q. You got in your automobile that was there?

A. No, I got a taxi downtown, and he took me over home there, and then I got the car and then drove on to Searchlight. [116]

Q. Well, you got the car, you got your automobile at——? A. At my house.

Q. At your house.

The Court: He said he got his automobile, got in it and drove it back to Searchlight. Now that has been answered already.

Q. (By Mr. Baraty): Now what did you do when you got to Searchlight, to take care of yourself?

A. I just hung right around pretty close to the house and stayed in bed when I felt bad and got up when I could, and done the best I could.

Q. When did you see a doctor next?

A. Well, I seen Dr. Fenlon two or three times, maybe four times, between then and the 19th of September.

Q. At Searchlight or at his other place at Boulder City?

A. Well, I went to Boulder City once and seen him. and I think the rest of the time we were in Searchlight.

(Testimony of George H. Graham.)

Q. Well, when did you stop having the attention or seeing Dr. Fenlon?

A. Oh, I don't know. I have never stopped, outside of the last, since last October or last November, and I give up his house in Searchlight and moved out onto one of my claims there, and that is where I live. I don't get to see him much.

Q. Well, did you again come to the Santa Fe Hospital Association for treatment? [117]

A. In December of '45, I did.

Q. In December of '45. You came into Los Angeles?

A. I went out there on December the 10th and was admitted to the hospital.

The Court: You have answered; you went out there December 10th.

The Witness: That's right.

Q. (By Mr. Baraty): Did you go to the hospital in Los Angeles before December 10, 1945, outside of the trip you made out there in August?

A. In August.

Q. Was it in August you went down there?

A. I was in the Hospital in August.

Q. And you stayed ten days there?

A. Ten days.

Q. Did you go back again between then and December?

A. No; oh, I believe I was out there one time to see Dr. Morrison, and that is what I had to do that to go back to work.

Q. Yes. Now didn't you go back to Los Angeles

(Testimony of George H. Graham.)

to obtain a release from the hospital so that you could go back to work? A. Yes.

Q. And you obtained that release that was put in evidence here yesterday, known here as Exhibit, Plaintiff's Exhibit 1, on the 18th of September, 1945? Your counsel produced this yesterday (handing to witness). I have a carbon copy of it. [118]

A. It was the 19th.

Q. I am very sorry, sir; I was looking at the date of the document. We are one date apart. Now you sought this release to go back to work; you wanted it?

A. I couldn't go back to work without it.

Q. That is the way you interpreted the rule?

A. That's right.

Q. Well, didn't you know that that was not the proper interpretation of the rule?

Mr. Emmons: I will object to that on the ground it is leading and suggestive.

The Court: Overruled.

Mr. Emmons: Well, I will withdraw my objection.

Mr. Baraty: I will withdraw the question for the time being, your Honor.

Q. (By Mr. Baraty): The first thing that is necessary is a release from the doctor, isn't it, before you can get back on the job again?

A. That's right.

Q. That was what you have got here—that is in evidence? A. That's right.

Q. On the 19th—it was dated the 15th of Sep-

(Testimony of George H. Graham.)

tember, 1945, and it authorized, "Qualified for regular duty, 6:30 a.m. 9/19/45. W. A. Morrison, Surgeon." Now with that in your possession, what did you do with reference to seeking your [119] job back again?

A. Well, when I obtained that release,—

The Court: Well, can't you answer that simply? Did you go and get your job?

The Witness: No, I didn't.

Q. (By Mr. Baraty): Did you make an effort to get your job?

A. No, there was nothing I could hold.

Q. What do you mean by that?

A. Well, there were no vacancies or nothing on any run, and I put a bid in and caught 2nd 23 into Los Angeles, caught that run.

Q. Well, with that release in your hand from the doctor, you made an effort then to get this job?

A. I did.

Q. And you found a job?

A. He told me not to attempt any freight work, but to take passenger work only.

Q. And didn't the doctor tell you that for a short period of time he thought you should take passenger duty?

A. He told me that I should go on a passenger job and take it easy, and not to extend myself too much, just to take it easy.

Q. How did you feel physically when the doctor gave you this medical release?

A. I didn't feel good at all. [120]

(Testimony of George H. Graham.)

Q. Well, how did you feel? Where were your hurts, if any?

A. Still bad; I was all shook up, severe pain through my back. I couldn't hardly move around at all, but he says, "We need men, the war is on yet."

Q. I see.

A. "Help us out, go back to work if you can get around at all."

Q. And so what day did you go out on a passenger run?

A. Well, it was after, maybe the first or second of October.

Q. If I tell you that you went out on September 30, 1945, on 2-2-3 with Conductor Dresser, would you say that that was right or wrong?

A. Well, that may be correct, because I am not sure. I haven't got my time card or any time slips.

The Court: Let's not argue about the 30th of September or October 1st.

Mr. Baraty: Well, your Honor, that will have some bearing; that will be material. I am not quibbling about one day.

Mr. Smith: The release was signed on October 1st.

The Court: Oh, I see. All right.

Mr. Baraty: May I have that last read, your Honor.

(Record read.)

Q. (By Mr. Baraty): Well now, you have heard us discuss this matter; does that refresh your memory, that you went out on 2-2-3 under Dresser?

(Testimony of George H. Graham.)

Mr. Emmons: I submit that has been asked and answered.

A. I don't remember who the conductor was.

The Court: Well, do you dispute the fact that you went out as the records show?

The Witness: Well, I will accept that. I just don't remember, Judge.

Mr. Baraty: All right.

Q. (By Mr. Baraty): Now then, after you got the doctor's release—I will withdraw that. At the time that you got the doctor's release, either before or afterwards, had you placed any claim against the company for any reimbursement for the injuries that you sustained? A. No.

Q. Didn't you have an attorney in Los Angeles by the name of Emmett A. Tompkins, to whom you had given your claim, placed your claim in charge, because of this accident that happened on the 6th of July, 1945?

A. I didn't authorize Mr. Tompkins to do anything for me.

Q. Well, you knew Mr. Tompkins?

A. I knew him, yes.

Q. In fact, he was then handling another action for you against the Santa Fe? A. He was not.

Q. On September 18, 1945, the day you obtained your medical release from Dr. Morrison, didn't you see Attorney Emmet A. [122] Tompkins concerning this claim against the Santa Fe?

A. I met him over at the Stowell Hotel.

Q. And didn't you authorize him to inform the Santa Fe that he represented you?

(Testimony of George H. Graham.)

A. No, I didn't.

Q. I will show you a——

Mr. Emmons: May I see it?

Mr. Baraty: Yes, excuse me.

(Handing to Mr. Emmons.)

Q. (By Mr. Baraty): I will show you a document that I have just shown to your attorney, Mr. Emmons, and ask you to just read that over to yourself and see if that may refresh your memory (handing to witness). A. Well——

The Court: He hasn't asked you a question yet.

Q. (By Mr. Baraty): Does that refresh your memory?

A. That refreshes my memory, yes.

Q. Now I will ask you another question.

A. But he wasn't authorized to handle it.

Q. I will ask you a question.

A. Okeh.

Q. Did you authorize Mr. Emmett A. Tompkins to address a letter to the Santa Fe Railroad to the effect that he was representing you in this claim?

A. No. [123]

Mr. Emmons: If your Honor please, I will submit that the letter itself is the best evidence, and it does not say that this attorney is authorized to represent Mr. Graham in this case.

The Court: Well, the question is proper: I will overrule the objection. The question was whether he authorized the lawyer to do it. You may answer.

A. No, I didn't authorize him.

Q. (By Mr. Baraty): I see. Now——

Mr. Baraty: I would like to have this letter

(Testimony of George H. Graham.)

marked as the defendant's exhibit for identification next in order.

The Clerk: Exhibit A for identification.

(Letter referred to above was then marked Defendant's Exhibit A for identification.)

Mr. Baraty: Now what next, if anything, did you do yourself, personally, toward making an adjustment of the claim?

A. I went to Mr. Lewis.

Q. Mr. Evan Lewis? A. In Needles.

Q. At Needles. And what is his capacity?

A. Claim Agent.

Q. At Needles. You knew him?

A. I had met him.

Q. And you went to his office at the station building, did you? [124] A. I did.

Q. What was that? A. I did.

Q. For what purpose?

A. Well, to see what kind of a settlement we could make.

Q. I see. And what was the conversation you had with him?

A. Well, he offered me a settlement which was fair.

Q. He offered you a settlement?

A. Yes, and the Los Angeles Office wanted to settle it in there, so some way or another—I don't know why.

Q. Well, before seeing Mr. Lewis, did you see anybody else in the claims department?

A. Simms.

Q. You say Simms; and he was an assistant

(Testimony of George H. Graham.)

claims adjuster in Los Angeles, in the Los Angeles Office? A. That's right.

Q. Didn't you go to see Mr. Simms the same day that you got the release from Dr. Morrison?

A. No.

Q. What date?

A. Oh, yes, I did too. When I got my first release on the 24th of August and left the hospital, I went down town and I did go up and see Simms.

Q. That is the time you asked the doctors, that you wanted to walk out?

A. I wanted to go home. [125]

Q. In August. And you went down to see Simms at the Los Angeles office?

A. He called me.

Q. Mr. Simms called you?

A. Yes, he did.

Q. Where did he call you?

A. Out at the hospital.

Q. And you went to the office all by yourself?

A. I called a taxi, I believe, and I went downtown and I went in the Santa Fe Building and asked what he wanted with me. He called me and I responded.

Q. And he told you he wanted to discuss with you the possibility of adjusting your claim?

A. That's right.

Q. And nothing came of that? A. No.

Q. So then you are back in Needles, and you saw Mr. Evan Lewis? A. Way later on.

Q. About when, sir?

A. Well, it was—oh, I would say, around the

(Testimony of George H. Graham.)

25th or something like that, of September.

Q. About the 25th?

A. Maybe it would be later, or maybe a day or two earlier.

Q. The 25th of September? [126]

A. Oh, along about that time; I don't know.

Q. And what did your conversation with Mr. Lewis concern?

A. Oh, I just told him I would like to make a settlement and get back to work.

Q. And did you discuss the amount?

A. No, I think he made me a flat offer.

Q. Of \$1050?

A. No, a little bit more than that.

Q. How much?

A. Well, I think he offered \$1200 or \$1300, something like that, and the Los Angeles office wouldn't accept it, from what he told me.

Q. And then did you come to a figure with him?

A. No.

Q. Didn't you get to the point that Mr. Simms—Mr. Lewis, rather, was preparing a release for your signature in the sum of \$1050?

A. Well, I think Mr. Lewis told me I would have to go in to Los Angeles to settle that.

Q. Didn't you come to a point where you told Mr. Lewis you would take \$1050 and he was preparing a release?

A. I don't remember. Exactly, I couldn't say; I know we came to an agreement with Mr. Hitchcock, I think, wanted to talk to me. I don't know the general conversation.

(Testimony of George H. Graham.)

Q. Do you recall while Mr. Lewis was preparing this release, [127] that you demanded of him that he strike out any reference to releasing the engineer from a claim that you might have against the engineer for damages?

A. I don't remember that.

Q. And don't you remember that you insisted that the words, "its agents and employees" be excluded from the release?

A. I don't remember just that.

Q. I am going to show you a document and ask you if you have ever seen this document before, and drawing your particular attention to the words that are crossed out there. (Indicating and handing to witness.)

A. Well, I might have seen this before. I don't recall off-hand.

Q. Don't you recall that it was at the time you were discussing the settlement with Mr. Lewis at Needles that this document was prepared?

A. No, I can't say that I do recall it.

Q. Do you remember striking out the words that are stricken out there? (Indicating.)

A. What words do you mean?

Q. Right here. (Indicating.) A. Oh.

Q. "Its agents and employees"? I think those are the words. A. I didn't strike it out.

Q. You didn't strike that out yourself? [128]

A. I don't think so.

Q. You don't think so.

A. In fact I know I didn't, to my knowledge.

Q. What is your best memory?

(Testimony of George H. Graham.)

A. I don't remember it.

Q. Do you remember having a discussion with Lewis and saying that you weren't going to let this engineer get away with it, that you were going to have a suit against him?

A. I don't remember that.

Q. And Lewis told you that this release couldn't be changed, that it either had to be taken or not signed? A. I don't remember that.

Mr. Baraty: I would like to offer this as defendant's exhibit next in order for identification.

Mr. Emmons: For identification—that is all right.

Mr. Baraty: That is all.

The Clerk: Exhibit B for Identification.

* * * *

[129]

Mr. Emmons: I am sorry to have delayed you, your Honor. At this time, if your Honor please, I would like to call Dr. Niemand out of order, if we may.

Mr. Baraty: We have no objection.

The Court: Very well, put him on.

Mr. Emmons: Dr. Niemand, take the stand, please.

FREDERICK G. NIEMAND,
called on behalf of the plaintiff, sworn.

The Clerk: Q. Will you state your name for the Court and the Jury?

A. Frederick G. Niemand.

Direct Examination

Mr. Emmons: Q. Now, Dr. Niemand, you are

(Testimony of F. G. Niemand.)

a physician and surgeon, practicing here in California, are you? A. Yes, I am.

Q. And your offices are at 450 Sutter Street, here in San Francisco? A. That's right.

Q. And you have a license to practice medicine in California? A. Yes, sir.

Q. And are you licensed by any other board?

A. Well, the National Board of Medical Examiners.

Q. I see. Now how long have you been practicing here? A. 1929.

Q. Are you on the staff of any hospital here in San Francisco?

A. I have been on the staff of the San Francisco Hospital. I am on the staff of the St. Francis Hospital now.

Q. I see. Have you ever taught at any of the medical schools in the Bay Area?

A. Stanford Medical School.

Q. And in the course of your practice, doctor, the practice of your profession, do you treat and examine cases dealing in personal injuries, upon injuries? A. Yes, I do.

Q. And could you estimate approximately how many such cases you have examined in your practice during the course of your practice?

A. That is pretty hard to say. I was in the emergency practice, and we used to see a great many cases of all kinds, and of course naturally, in the practice of medicine, you see all sorts of traumatic injuries. It would be pretty hard for me to say how many I have seen.

(Testimony of F. G. Niemand.)

Q. Now during the course of your practice with the Emergency Hospitals, did you have occasion to X-ray those injuries too?

A. Well, what I would do, I myself might see injuries of various kinds, and then being on the staff at the County, [131] I would follow them up to see what happened to them. Of course it was not in my service, but I would do that on my own.

Q. Now in your practice, have you had occasion to examine and read X-ray pictures of various parts of the body of your patients?

A. That's right.

Q. And how frequently would that practice be?

A. Oh, every day.

Q. Practically every day? A. Every day.

Q. I see. And for what purpose would you take or have these X-rays taken?

A. Oh, for any purpose that we would use the X-ray as a diagnostic medium in determining whether there has been a dissolution of the continuity of a bone, or whatever it might be, or a probable traumatic injury. That means a fracture, in other words. The dissolution of continuity is the way we speak of a fracture or a break of the bone; a fracture and a break are the same thing.

Q. I see. Now will you explain to me and to the members of the jury the location of the cervical and the thoracic and lumbar vertebrae?

A. Yes. There are three different types of vertebrae; there are the individual bones of the backbone, and the three divisions of these are the cervical vertebrae, which are in the [132] neck,

(Testimony of F. G. Niemand.)

beginning at the base of the skull; going downward to, we will say, about midway, or we will say at the upper end of the scapula—from there on, we have the thoracic vertebrae, which is down to about, we will say, where the ribs end, as they insert into the back; and then we have the lumbar vertebrae, which go on from there. Then finally, the lumbar vertebrae fuse into the sacrum, which is the bottom bone, ending with a little tail-like appendage, which we call the tail-bone, which is called the coccyx medically.

Q. Now do you, Mr. George H. Graham, who is the plaintiff in this action? A. Yes, I do.

Q. Do you know him personally or professionally? A. Professionally.

Q. And when did you first see Mr. Graham?

A. September 18, 1946.

Q. Do you recall what his complaints were at that time?

A. Well, his complaints have been the same since—I mean, just to clarify the situation, his complaints have been the same from that day until this, with increasing severity over the period of time. And he complained at that time of this difficulty in his lower back, his inability to extend or flex his back. In other words, flexion meaning to bend his back forward, (Indicating) or to extend his back means to straighten it out, putting your head back so. (Indicating.) He had a [133] definite limitation of motion both in flexion and in extension. He also had limitation in sidewise motion of

(Testimony of F. G. Niemand.)

the back, to the left and to the right, and in rotatory function of the back. Those are the standard motions that we put patients through in order to determine how much limitation of motion may be in existence in the back, and what degree of severity of injury possibly might be causing that disability.

Q. Now how many times have you seen Mr. Graham professionally?

A. Oh, I would say about ten times.

Q. As a result of your examination of Mr. Graham, did you have X-rays taken of his back?

A. Yes, I did.

Q. And I will show you here—

A. I really haven't given you a very good answer on that last question as far as the total amount of difficulty he had in his back and, I might say, I hadn't quite finished it.

Q. Well, you continue, then, doctor; do you want the question read by the reporter?

A. Well, just—what did he ask me?

The Court: He wanted to know what the plaintiff's complaints were.

A. (Continuing): He complained of pain in his back, and running down his leg. That is enough, then, in that regard. The limitation of motion, I think I gave that already.

Mr. Emmons: Q. Now I will give you these X-rays, doctor, [134] which are from your office and hand them to you and let you use them in your explanation, and I will ask you what, if anything, you found as a result of those X-rays in the nature of any disability or injury to Mr. Graham's back (Handing to witness)?

(Testimony of F. G. Niemand.)

A. Well, the first ones taken in our office are a lateral view of the man's back. Of course, we get better pictures in this sometimes, but our difficulty here is that the man is so big; that is a difficulty with the X-rays, and that is the difficulty with the treatment. Here we have our lumbar vertebrae, the 5th, 4th, 3rd, and up the line. In this distance—I don't think it shows as well in this picture as the other one. We will take another one, if you don't mind. That shows it better. Now this was taken in '48. That '46 is not as clear as the '48 one. We are seeing more. Now if you will notice the delineation of the vertebrae here, you will see that is very clear cut. I mean, the edges, the lines of it are very definite, whereas we see here in the 5th one, this bulging out. Then we have this bulging out here, and we have a lot of material in here (Indicating). You can see that it comes out here.

Now each one of the vertebrae are held up, or we will say, separated from each other, by a little doughnut, equivalent to the hole, is a little fluid. Now the medical name of the fluid ligamenta flava, we don't care about. In other words, in describing it, it is a little doughnut of cartilaginous [135] material which separates one vertebra from the other. Now with any type of flexion, as I pointed out to you, where you go down this way, (Indicating) a so-called "jackknife" fall—for instance, I remember a case, just to explain it, in which a fireman coming down a pole, he grabbed the pole

(Testimony of F. G. Niemand.)

and jumped down and hit too hard when he hit below, and jackknifed. He developed a typical thing which we have here, which is a compression of this little doughnut, which you can't see, because the X-rays only show lights and shadows. They show the bones because there is such a contrast in the difference between the bone and soft tissue. Now with any type of compression, this little doughnut part is broken or severed, and that fluid which the one vertebra rests upon, one upon the other all the way up the chain leaks out. Well, as a result of that, because of the excessive weight, because our spinal column carries all of our weight, gradually what happens is a breaking down of this disk, called the intervertebral disk. It gradually breaks down until you begin to see it shoot up like this. If we did what we call a "mylogram" on him, which is something that should be done when it comes time to repair the disability, that may show a part of this disk sticking out into the canal, into the spinal canal. Now this is the thing that he is having his back ache from. (Indicating). It is breaking down; it is the breaking down or degeneration of it, which will increase, of course, and which has, as we see, caused some arthritis to develop in [136] this area. Now let me see if we can show it by another picture. No, that is not as good. Here, that shows it very well. Again we see the protrusion. This is the effort of nature to stop the breaking down. Nature will sometimes make a bridge of arthritis across here so that the continual motion of this vertebra down,

(Testimony of F. G. Niemand.)

pressing down, pushing down by even the slightest motion of the back, increase that all the time. So you will find these people don't move around very much; they keep their backs still, and it is quite evident why they do. The fact is that the more they move, the more they are breaking down the disk, the more they are causing pressure on the nerve. Now, for example, in his case, he has definite changes in the left sciatic nerve, because the sciatic nerves which come out of here, it has been pinched and will be increasingly pinched until we do something about that—which is the removal of the disk and fusion of the joint. There is no other way you can treat the thing.

Q. I see. What is the date of that X-ray doctor?

A. September, 1946.

Q. Do you have an X-ray of any prior date to that?

A. This is 1948. Here is one taken at Boulder City on February 13, 1946. You can see it is not quite as marked a process. The arthritic process is not quite as marked as before, but the same chewing up process, the lack of delineation or clear cut view that you should see, just as you might see, in here— [137] there you can see where the disk is intact. See how clear that looks through there, and through here. But here, we see that. (Indicating.)

Q. Does that first X-ray show the crushing of the intervertebral disk, as you call it?

A. Yes, they all show that there is something has happened in that joint. Now I don't know, I

.(Testimony of F. G. Niemand.)

can't tell you the dates when that happened. I mean, there is no way of knowing that. I would say that the injury is there, and I know that any trauma he sustained is going to increase the injury, and that is all I can say.

Q. Yes. Now that is your conclusion from the X-rays, doctor? Those are your conclusions from the X-rays?

A. Yes. I mean, he has a fractured, degenerate intervertebral disk, 5th lumbar, and there are evidences of arthritis at that area, which shows that there is localized disability or disease.

Q. Is the arthritic condition due to this trauma?

A. Yes, because you see—

Mr. Baraty: What trauma? That is leading and suggestive.

Mr. Emmons: Q. To trauma. Let me put it this way:—

A. You had better say it again so I will be sure I have the right thing.

Q. Now is this arthritic condition that you find in the picture, is that due to trauma?

A. Well, I would say that he doesn't have any arthritis in any [138] of these other joints. They look clear as a bell, except here, where he has had the trauma—so that my only conclusion is that it's nature, trying to stop the motion in that joint.

Q. I see.

A. Which is nature's method of trying to do the thing we would try to do medically, or surgically, rather.

(Testimony of F. G. Niemand.)

Q. May I have the three X-rays you just mentioned here, Dr. Niemand, the three different dates that you have?

A. Let's see which ones I talked about now. Well, these two should go together. They are both at that time.

Mr. Baraty: There was one in '48, one in September of '46, and one in February of 1946 at Boulder City.

The Witness: These are September '46. That would be it.

Mr. Emmons: Q. Are these both September of '46?

A. No, that would be the middle group. Now these are August of 1948.

The Court: Well, what the attorney wants is the three X-rays.

The Witness: That is what I am trying to get together, Judge. These are the last ones. The first one is the middle one, the first taken are coming up now.

Mr. Emmons: I just wanted the one of the group there, doctor which shows the injury.

A. All those do.

The Court: Yes, but all the attorney wants you to do is to [139] hand him the particular ones that you put on the machine and testified about.

The Witness: All right, they got mixed up. That is number 1.

Mr. Emmons: Q. This is the one you just testified from?

A. Yes, that is the last one I testified from.

(Testimony of F. G. Niemand.)

But that is the first picture taken.

Q. That is the first picture taken, at Boulder City?
A. Yes.

Mr. Emmons: Now, if your Honor please, I would ask that this X-ray picture be admitted in evidence as Plaintiff's exhibit next in order. It is an X-ray dated 2/13/46, taken at Boulder City Hospital, No. 475, George Graham.

Mr. Baraty: I have no objection that those three go in, but I would suggest they be put in in the order that the doctor used them on the machine.

Mr. Emmons: I think that is immaterial.

Mr. Baraty: Well all right, that was just my suggestion.

The Court: Do you have the three of them? Get them together and we will mark them in evidence.

Mr. Emmons: Yes, sir.

The Witness: This August 16, 1948.

Mr. Emmons: This is the X-ray dated August 16, 1948, George H. Graham. We ask that that be admitted in evidence as plaintiff's exhibit next in order. And will you see which of [140] these that you have testified concerning—? Is this the one? Thank you.

We will ask that this X-ray be admitted in evidence as plaintiff's next in order.

The Clerk: To be marked Exhibits 2, 3 and 4, in the order presented to me.

(X-ray films dated 2/13/46, 8/16/48, and 9/19/46, were then received in evidence as Plaintiff's Exhibits Nos. 2, 3, and 4, respectively.)

(Testimony of F. G. Niemand.)

Mr. Emmons: Q. Now, doctor, I would like you to assume the following facts: That on July 6, 1945, two engines were traveling in a direction this way; that they collided forcibly with a caboose which was parked there; that it was in and about 1:30 in the morning; that the caboose, that a man was in the caboose, in the act of climbing from the floor of the caboose up to the cupola; that while he was up there, had ahold of a grabiron, as a result of the collision, he was thrown to the floor; that he landed on his back, left shoulder and left side; that when he was up on his feet again, the engineer of this train, or the engine, reversed the engine and let the rear end of the caboose down to the tracks; that as a result of this release, this man again fell to the ground; that when he was through—

Mr. Baraty: You mean the floor?

Mr. Emmons: Q. (Continuing) To the floor, yes, I am sorry [141] —to the floor of the caboose; when he was through, he complained of an injury to his back. Now could the trauma under such circumstances have caused a crushed vertebral disk?

Mr. Baraty: Well, the objection to that is that the doctor has already testified that he is not in any position to say when this injury happened.

Mr. Emmons: This is a hypothetical question.

Mr. Baraty: That is a hypothetical question. Mr. Graham has testified to a certain of facts, the doctor gives his opinion of the X-rays; it is a matter of conclusion.

(Testimony of F. G. Niemand.)

The Court: Well, I think counsel's question was general; he merely wants to know whether or not the force of the type he mentioned could cause a fracture of the type he mentioned of this nature.

Mr. Baraty: Well, the important question we are to determine here is whether this did it, and has been left out of consideration of distance and all that.

The Court: Yes, but we are not interested in some general situation; what you really want to know is whether a trauma of the nature you have described could be the cause of the condition of the spine which the doctor says is present.

Mr. Emmons: Yes.

A. Now when you say that to me, do you want to know whether it could cause that disk fracture or whether it could cause the symptom? That is two horses of a different color. [142]

Mr. Emmons: Q. Well, first, could it cause the injury you have testified to?

A. Yes, it could.

Q. It could. And could it also cause the symptoms? A. Yes, it could.

Q. Now the injury that you have shown us here as existing in those X-rays, could that have existed prior to the time of this accident?

A. Yes, it could.

Q. It could. Now assume that it did, doctor; would that type of a condition in a man be a disabling one? A. Oh, without question.

Q. Would it be disabling? A. Absolutely.

(Testimony of F. G. Niemand.)

Q. Now are you certain that you have my question in mind, doctor?

A. Well, say it again.

Mr. Emmons: Will you read that question again?

The Court: He is trying to get, he wants you to say, doctor, that if there was a pre-existing condition of that nature, that the condition might not necessarily be disabling.

The Witness: Oh, I didn't understand your question.

Mr. Emmons: Will you read the question back to him please?

(Record read.)

Mr. Emmons: Q. Well, I think your answer is correct there; [143] my question was not correctly framed. This is what I wish to ask you: Would this man have any pre-existing condition which would be disabling prior to the time of this accident?

A. No, not necessarily; he could have a degenerated disk without it necessarily being very disabling. It might not disable him. We could say that he might have—just by tying your shoelace like this, (indicating) and you could fall off onto the floor, like I have had them, and sit on the floor and get a disk fractured. Then it might not bother you for ten years, until some acute thing really starts more of that cracking together of the vertebra (indicating). That is what happened in this case.

Q. Then it is possible that this could have been

(Testimony of F. G. Niemand.)

unknown to Mr. Graham prior to the time of this accident?

A. Well, it was evidently unknown to the Santa Fe when they examined him, or they wouldn't have taken him.

Mr. Baraty: May I ask that that be stricken? It is not responsive. The Santa Fe will take care of that when it gets to it.

The Court: Yes, that answer may go out.

Mr. Emmons: Now, doctor, assume then that a man had this pre-existing condition and this traumatic injury; would it necessarily be a permanent injury?

A. You mean if he had a fractured disk?

Q. Yes. [144]

A. Would it be a permanent injury?

Q. Yes.

A. You mean, in other words, would it go away at some future time without doing anything about it?

Q. Yes. A. No.

Q. In other words, that will exist and continue on?

A. If you have the fracture, the fluid leaks out and degeneration or crushing of the disk begins. When it goes to the point that it starts to impinge upon the nerves, of course you will have pain in the back, meanwhile—then you have trouble. But the process may take several years. It might take quite a long time before that comes along.

Q. Does it get progressively worse?

A. Unless, for example, suppose your arthritis

(Testimony of F. G. Niemand.)

bridge across. Well, that would slow up the process of the thing.

Q. I see.

A. But there is only one way to fix it and to do anything about it, and that is—or to handle it—and that is to surgically take care of it.

Q. I see.

A. That is the accepted treatment today. You see, not very many years ago, we had people who came in with chronic back aches, and we ascribed it to all kinds of things—lumbosacral strain, sacroiliac strain and a lot of them had disks and we [145] didn't know it. We treated them for that for years. We are just finding out about some of these things.

Q. You have to be a specialist in intervertebral disks to see those things? A. No.

Q. Can the average doctor, reading these X-rays, see those? A. Sure.

Q. Now let me ask you this: In your opinion, can this—

A. In San Francisco, I mean, the larger sized cities. I mean, I think they are better, shall we say, trained in traumatic things, possibly than the smaller places.

Q. I see. In your opinion, doctor, can this man expect to recover from the effects of this injury?

A. Oh, yes; well, with surgery, sure.

Q. With surgery. Will it require surgery to relieve the pain and suffering which he has undergone?

A. That is the only treatment that is any good.

(Testimony of F. G. Niemand.)

Q. Now what is your prognosis as to his injury?

A. With surgery it will be good.

Q. With surgery?

A. I mean, if it isn't done, he is just going on and he will get worse, and worse, and worse.

Q. And that is your prognosis?

A. There is no question. I mean, that is without any question. That is the way these things go. You can see why, because it [146] is just going to grind down the disk, and then it will start to grinding down the vertebrae until you do something about it.

Q. Now, doctor, if you received a report from an X-ray technician that the films—

A. You don't receive reports from the X-ray technician, we receive them from an X-ray doctor or roentenologist.

Q. Then I will be corrected on that—from an X-ray doctor, reporting that films of the thoracic and lumbar spine do not show any fracture, dislocation or bony pathology, and that related to Mr. Graham's back after this injury, would say that that was a correct statement?

A. If I received a report just on the cervical and the thoracic vertebrae and it showed nothing?

Q. No, the films—

The Court: Well, that is obvious, counsel, that if he received a report that there was nothing the matter with a man, then received a report that there was nothing the matter with the man. How can he answer that? Or were you asking him to say that if some doctor disagrees with him, he

(Testimony of F. G. Niemand.)

doesn't agree with the doctor that disagreed with him?

Mr. Emmons: Q. Well, assume that that report came in, doctor, that the films of the thoracic and the lumbar spine do not show any fracture, dislocation or bony pathology; assume further that this man was treated by the doctor who requested these X-rays to be taken, and that on a subsequent time, within [147] the last month, he read them for the first time, those X-rays, and examined them and concurred in the report which I have just read to you. Would that be a matter, the injury which we have described here, that doctors could honestly and reasonably differ?

Mr. Baraty: Well, I will object to that as leading and suggestive, asking for the conclusion and opinion of this doctor and to the possible testimony of somebody else.

The Court: I think the objection is good, counsel.

Mr. Emmons: May I have your hospital record?

Mr. Baraty: Yes, sir.

The Court: Mr. Emmons, I made that ruling because I find that is a common practice for lawyers to ask that sort of a question—that if some other doctor holds a contrary view, then “you, doctor, think he is wrong?” Well, those are argumentative questions. Your doctor may testify one way, a doctor on the other side may testify the other way. The jury may resolve that; they will have to decide what testimony they are going to accept. But it becomes argumentative when you ask

(Testimony of F. G. Niemand.)

one doctor whether, if another doctor comes to a certain conclusion, that doctor is wrong.

Mr. Emmons: Q. Well, in your opinion, Dr. Niemand, in examining this man and taking X-rays of his spinal injury, could any doctor who makes a practice of taking X-rays have missed, or diagnosed the particular injury here in question— [148]

Mr. Baraty: We object to this question; it is argumentative, calling for a conclusion, and invading the province of the jury.

The Court: I think the objection is good, counsel. Those are questions that don't add anything to the testimony of a witness. The witness may give his opinion, but it doesn't do any good for him to state that the opinion of someone who doesn't agree with him is incorrect, because that is just his opinion.

Mr. Emmons: Q. Well, let me ask you this, Dr. Niemand: In your opinion, was this condition which exists at the present time in existence the first time you saw this man—was it in existence on August the—? A. 19th, August 19.

Q. Let's see. On August 16, 1945?

A. I don't know then. I didn't—the only time I could say it was in existence is when the first X-rays were taken, in February of 1946, wasn't it?

Q. Yes.

A. If it could be seen in that picture.

Q. It can be seen in that picture?

A. Oh, it is evident in that picture. And I am not a roentenologist either.

Q. Now what is Mr. Graham's present condi-

(Testimony of F. G. Niemand.)

tion in regard to limitation of motion, if any?

A. He has definite limitation of all motions of his lower spine. I mean, in all of the motions that we put him through, as I explained before. And he has muscle spasm and things of that kind, but them that is incidental to the diagnosis.

Q. Did you witness those? A. Oh, yes.

Q. You put him through the tests yourself?

A. That's right.

Mr. Emmons: You may cross-examine.

Cross-Examination

Mr. Baraty: Q. Doctor, this disk involvement that you speak of, if it was caused by trauma, you haven't any idea when that trauma occurred, have you? A. I can't say when it occurred, no.

Q. It could even have occurred during childhood? A. Oh, I don't believe that.

Q. You don't think a boy— A. No.

Q. —playing rough games or football or something like that— A. No.

Q. Wait a moment please.

A. Excuse me.

Q. (Continuing): —playing games of that type could fracture a disk that he would carry through into later life? [150]

A. No, I don't think so. I think that the symptoms of that much of a crushing injury to the disk would have made themselves apparent before that.

Q. But you are not able to say that Mr. Graham was hurt at the time he claims, in this action this is now before this court?

(Testimony of F. G. Niemand.)

A. No, I can't tell you the date of that accident within, we will say, a reasonable time. I mean, I know it wouldn't go back that far. We usually expect these things are going to—well, you take a man particularly with his frame, heavy as he is—you would have sooner evidences of the symptoms of a fractured disk than you would with, say, a man that had a very light frame.

Q. What do you mean by "the degenerative process of the disk and the spine"?

A. Well, it is the idea that one vertebra is on top of the other, and when the fluid which holds the two apart is gone, then the bone against bone (Indicating) crushes the cartilage, which is sort of soft tissue, by the contact, the constant movement of the back, which goes through various motivations. It keeps on crushing, crushing, crushing, until it just degenerates. It brakes up, it smashes, it disintegrates that particular disk.

Q. Well, isn't the degenerative process of the spine something that comes naturally? [151]

A. No, this—

Q. Without a blow or trauma?

A. The degenerative what of the spine?

Q. Process.

A. I don't know what that means.

Q. You don't know what it means?

A. There could be an arthritis, there could be a thousand things under the name "process." That is too general a name.

Q. Well, you pointed out some arthritis on the vertebrae surrounding this disk? A. Uh-huh.

(Testimony of F. G. Niemand.)

Q. The top of the sacrum and the lower, the fifth. What does that indicate? How is that formed, what does it come from? A. I wish I knew.

Q. You don't know?

A. No one knows the causation of arthritis. In this case, all that we have to ascribe it to is the particular injury at that joint, which is what we call a traumatic arthritis, which means an arthritis which develops at that point due to irritation. But the causative process of the typical arthritis, that you see in people, we don't know.

Q. Well, arthritis doesn't develop because of a blow, does it? A. Yes, it can.

Q. It can? [152]

A. Yes, traumatic arthritis. That is a well known fact.

Q. It can. Now tell me the other types that can develop, talking about arthritis?

A. Well, the typical kind that can develop following a blow or an injury to a joint is a well known medical entity, and that is called traumatic arthritis.

Q. Now that is what we have been speaking about. Suppose there isn't any traumatic arthritis; how does arthritis develop?

A. How does it develop?

Q. Yes, how does it come about?

A. It comes about, we might say—we might describe it by the "increasing deposition of bony material at some particular point of irritation," or sometimes without irritation. In other words, the joint's surfaces become thickened, and the motion

(Testimony of F. G. Niemand.)

is impaired, and the musculature of the tendons begins to contract, and then you get a typical deformity of that arthritis, so there is less motion in the joint or in the back, and we have maybe a typical "poker" spine, and that is when we have arthritis all along the spine. But in this picture, as you notice, there isn't any arthritis except at that one point. (Indicating.)

Q. Well, that can come about through natural causes, can't it?

A. Not when it is localized like that. If it was from natural causes, you would see it along the whole lumbar spine. That [153] is traumatic arthritis; it is nature's endeavor to hold that joint from crushing that vertebra.

Q. That is your diagnosis now?

A. Absolutely; yes, sir.

Q. But you are not able to say when the trauma existed or when it was created?

A. No, I couldn't do that. I mean, putting a date on it, like the X-rays have a date. I could say relatively.

Q. Could it have happened ten years before this accident?

A. No, I don't think that long.

Q. Five years?

A. More likely.

Q. More likely five years?

A. Maybe five, I don't know. It is hard to say. It is very difficult to say, because it can come—you have to realize this—from such inconsequential trauma that the patient may not be aware of it until X-rays are taken.

Q. Will you in these three exhibits, if you

(Testimony of F. G. Niemand.)

please, doctor, show me the one that was the earliest one taken, please?

(Handing to witness.)

A. I think this is the one; yes. This is the first one here. It is quite evident in that, as you can see. (Indicating.)

Q. Wait a moment, I will ask you a question.

A. All right.

Q. Now you have now on the film box what is known here as [154] No. 2 in evidence. Now would you please tell us when that X-ray was taken? A. The date is 2/13/46.

Q. 2/36—February 13, 1946? A. Uh-huh.

Q. And where was it taken?

A. Boulder City Hospital.

Q. Was there a report of the roentenologist that took that, that accompanied the picture?

A. Yes, there was.

Q. Have you got it? A. No, I haven't.

Q. You haven't got it with you?

A. No, they reported the same thing, a degenerated disk.

Q. Who is supposed to have taken that?

A. That was taken at Boulder City and reported from the U. S. Marine Hospital, and they reported a degenerated disk.

Q. Now does that, in February of '46, show a calcification there above the sacrum?

A. Yes, here and here, and here. (Indicating.)

Q. To what extent is there calcification there, can you tell?

A. I would say there is moderate calcification.

(Testimony of F. G. Niemand.)

Q. In your opinion, how long prior to the taking of this X-ray film has that calcification existed?

A. It depends; that can't be ascertained, because it depends [155] upon the—nature puts out this material as quickly as it needs it, and that can come very rapidly with a severe injury, and with a man that has the weight this man has, this could make itself appear in relatively quick time.

Q. I was going to say rapidly is a relative term?

A. That's right.

Q. Now just what do you desire for us to understand by your use of the word "rapidly" in connection with the question I have just put?

A. I would say within a few years.

Q. A few years. So that in February of 1946, the calcification that you read on the film that is now in the box, in your opinion, would be a few years duration?

A. Uh-huh, as far as I could ascertain.

Q. And when you say that, you are mindful of the fact, are you, that the injury claimed to have occurred here is alleged to have happened on the 6th of July, 1945?

A. Counsel, the things that you have to realize are that symptoms and pathology are not concomitant. By that I mean that you may have a considerable pathology and very few symptoms and very little pathology, and a great deal of symptoms. In other words, this man could have had such a disability giving him very little trouble until an acute blow (Indicating) which flares it up in a marked degree.

(Testimony of F. G. Niemand.)

Q. Doctor, do I misunderstand you when you say that the [156] calcification on the exhibit now in the shadow box, in your opinion, is of a few years' duration prior to the taking of that X-ray film?

A. Yes.

Q. We understand—that is correct, isn't it?

A. Yes.

Q. I don't misunderstand you, do I?

A. No.

Q. Now I am showing you a film that was taken at the Santa Fe Hospital, the Santa Fe Company hospital at Los Angeles by Dr. McColl, Roy L. Fiedler. "Name, George H. Graham (I think it is, with a number). Age 49. Name of technician—date, 8/16/45," with a signature of a doctor. Oh, yes, Dr. Flamson. Now, this comes from the hospital file of the Santa Fe Hospital Association for Mr. Graham, and I am asking you if you will show us if there is any calcification noted in the disc, the intervertebral disc between the fifth vertebra and the sacrum in this film. Now I may not be putting it on right. If I am not, you know how.

A. No, that's right. Of course, this isn't as good a picture, but of course you can expect that as between Los Angeles and San Francisco. We do much better up here.

Q. Well, that is all right, but it is a good picture, as good a picture as taken at Boulder Creek?

A. Well, you can see the same calcification in here. It is not [157] as evident, but you can see it, there and there. The same calcification goes across there.

(Testimony of F. G. Niemand.)

Q. So the calcification—

A. Trauma could be there, and probably was there at that time.

Q. In other words, there was trauma when this picture was taken in 1945, August 6, 1945, and are you prepared to say that that calcification indicated in the film there was at least two years' duration at that time?

A. It doesn't look as marked there as it does in our pictures. Now, that could possibly be from our better X-rays, it could be because of difference in time. It isn't as good, it really isn't. You can see that yourself if you compare it. It just isn't as good a picture.

Q. There is no question but that there is an injured disc in that?

A. Yes, you can see the same thing in here. You can see the clearness of that one, and you can see the lack of clearness there.

Q. And your testimony, of course, is that you are not able to say when the—

A. No, nobody could tell you that.

Q. When the trouble or the blow caused that narrowing? A. Uh-uh (negative).

Q. Well, of course, before I ask another question—

Mr. Baraty: I would like to offer this in evidence as [158] Defendant's next in order.

The Clerk: Exhibit C.

Mr. Emmons: No objection.

(X-ray film dated 8/16/45 referred to was received in evidence as Defendant's Exhibit C.)

(Testimony of F. G. Niemand.)

Mr. Baraty: I don't want to mix these up. Either one of the three you were using.

The Witness: He has it there.

Mr. Baraty: Q. Is this it?

A. Yes. One difference is, you see these are dealing with a rotating and odd tube, which makes a much better picture of the back than those that were taken at a prior time. You see, it is different.

Of course, when you go up to the fourth and third and second, why, there is a nice, pretty picture there, and you can see perfectly. That is straight up and down, practically.

Q. But when you get down to any man's sacrum, why it starts to bend inward again, doesn't it? A. Yes. You mean, the fact—

Q. You don't have the perfect formation you have of the top of the fourth and third and second.

A. Well, no, the reason you have the perfect formation—but what you have to contend with is the fact that you have the ilium here, that you are shooting through both ilii to get that picture on that plate. In other words, when the man is [159] standing this way, you have got this bone in the road, this ilium that comes up here, see, and you have got one over here. So when you are shooting this here, you have got both ilii, which are evidenced by this, to go through in order to get the picture of that. That is why it doesn't look as nice. But I am not talking about that. Now, the X-ray men, of course they have tremendous ability to see these things—much better than I have, or anybody.

(Testimony of F. G. Niemand.)

has, because that is all they do. But it is quite evident to me here, that you have got something going on in that joint by the fact that process is sticking out there, and by the narrowing of this angle. Now, that angle should be—do you mind if I make a mark on there to show you what it ought to be?

Q. That is all right with me.

A. I mean, this is just tentative, but just to give you an idea, in other words, we should have something like that on here as a distance between them (marking X-ray). In other words, you should have a distance like that between the sacrum. It shouldn't be constructed like it is, it should be a definite gap there.

Q. And it is still bending forward as it gets way down into the sacrum, isn't it, and narrower?

A. What do you mean? It is still bending forward?

Q. Well, you get off the perpendicular that you have between the fourth and fifth and the second?

A. You mean the fact that the sacrum begins to turn inward?

Q. Yes, sir.

A. Yes, the sacrum begins to turn in.

Q. Now, I will ask you a little bit from down here. Do you know the age, or did Mr. Graham give you his age?

A. Yes, he gave it to me. What was it—48 or 49? Something like that. I have forgotten exactly.

Q. And does that age have any tendency to

(Testimony of F. G. Niemand.)

make stiffer the lower vertebrae there in any of us humans?

A. No, not in his case, because he has got some beautiful vertebrae above here. I mean, I hope mine are as good. I mean, they are really good. He has no arthritis, no arthritic changes otherwheres. Now, I haven't taken any pictures of his hands, but he doesn't evidence any arthritis except at that point, and the X-ray man concurs with that same idea, that the spine is—

Q. Well, as an ordinary thing, with the average man who gets into the fifties—

A. I would expect more than that.

Q. You would expect more than that in the average man. Before I forget it, have you the reports of the two that were offered in evidence here, the reports of the roentenologist that accompanied Exhibits 3 and 4?

A. Here is the last one. Well, there is no report with that. That was it. [161]

Q. Are these taken in Pines' and Williams' office?

A. Yes, Pines and Williams.

Q. There was no report accompanying it?

A. Yes, there was, but they were not in evidence.

Q. Have you got it with you?

A. Yes, I have got a report here.

Q. But have you got it there?

A. That is not in evidence, though.

Q. Well, maybe I will put it in evidence.

A. O.K.

(Testimony of F. G. Niemand.)

Q. Now, do you agree with this report that says there is no evidence of fracture?

A. Of the vertebrae, yes.

Q. I am reading that correctly from the report?

A. Yes.

Q. There is no evidence of fracture?

A. He means of the vertebra.

Q. With the insertion of what you say, the rest coincides with your opinion? A. Oh, yes.

Q. The films?

A. Yes, I have no fault with that at all.

Q. The lumbosacral disc space is narrowed to the same degree as seen in the examination of 9/19/46, and previous films made outside on 2/14/46; do you agree with that diagnosis? [162]

A. Yes, that is all right.

Q. There is a localized spur formation around the joint. Do you agree with that?

A. Uh-huh (affirmative).

Q. "Alignment of the spine is normal." Do you agree with that? A. Uh-uh (negative).

Q. "The abdominal aorta shows scattered calcification?" A. Uh-huh (affirmative).

Q. Do you agree with that?

A. Uh-huh (negative).

Q. What does that mean?

A. Well, a man like that is probably eating a lot of fat, which contains a lot of collestral, which is, we know, the deposit which occurs in arthritis and causes these arteriosclerotic changes in arthritis, and arteriosclerotic plaques or little patches

(Testimony of F. G. Niemand.)

along the artery, from eating and drinking too much things that are high in fat content—too much cream and butter and eggs and things of that sort.

Q. Well, the calcification, as it applies to that there, that isn't the same thing which appears on the bones of the spine?

A. It is calcification, it is collesteral deposits, and of course, in the spine it becomes real bone.

Q. And then I read from Dr. Williams' conclusions, "degenerated lumbosacral disc with localized degenerative arthritis." [163] Do you agree with him in that conclusion?

A. Uh-huh (affirmative).

Q. And there is no way of you telling when that process—

A. No.

Q. —started or what caused it?

A. Oh, I know what caused it. He had some type of a fall some place, somewhere. I mean, that probably was a jackknife type of fall.

Q. It couldn't come through natural process?

A. Absolutely not.

Mr. Baraty: I will offer this document in evidence as Defendant's next in order.

Mr. Emmons: No objection.

(X-ray report dated 8/17/48 was thereupon received in evidence as Defendant's Exhibit D.)

Mr. Baraty: Now, if your Honor can bear with me a minute, I will probably get through very quickly.

Q. Now, doctor, how many times did you say you saw Mr. Graham?

A. About ten times.

(Testimony of F. G. Niemand.)

Q. When were those times?

A. Well, I saw him at the date of the first pictures, in that interval, and I saw him at one interval in between. I can't tell you that date, but in that interval in between, and I assume again on the date of the last pictures.

Q. Well, is that four times or ten times? [164]

A. Well, I mean, I assume several times in that period of time. For example, we had examined his back, sent him out to have the X-rays taken, he came back and I examined his back, put him through his paces again—things of that kind.

Q. You haven't got any office records with you about that?

A. Oh, I did the—I mean, no, I don't have anything with me but that can be obtained.

Q. Doctor, were those X-rays all made here in San Francisco? A. Yes, 450 Sutter.

Q. Mr. Graham came from his home in Searchlight, Nevada, or Needles, California, for each one of these examinations?

A. Well, I presumed he did. I mean, as far as I know, he did.

Q. He walked in there?

A. He said he did.

Q. Walked in there by himself? A. Yes.

Q. Now, what was the purpose of his visits to you?

A. Well, to ascertain what was the matter with his back and what could be done about it.

Q. Did you treat him at all? A. No.

(Testimony of F. G. Niemand.)

Q. Well, then, the purpose of your examination was so that you would be able to testify here in court?

A. No, my purpose was, one, to diagnose his condition, whatever was wrong with that—if it was testimony in court, that was part [165] of the procedure, but I was interested in getting Mr. Graham's back fixed.

Q. Well, when you made the examination, didn't you know that there was pending in this court a lawsuit by Mr. Graham?

A. He told me that he had—I didn't know it was in this court. He told me that the thing was a matter of litigation.

Q. In San Francisco?

A. Well, I didn't know where.

Q. You didn't know where? Did he suggest to you that you might have to testify in Los Angeles?

A. No.

Q. Never did? Now, doctor, in the three X-rays that you put on the box, the one I showed you, do you say that there is a protrusion of the intervertebral disc between the fifth and the lumbar and the sacrum?

A. No, I said that if we did—well, let me explain what we would do, what ought to be done before you do something.

The Court: Well, he just asked you—

Q. I understand that if, upon examination or operative procedure, you might find that the disc protruded or impinged on the nerve or the nerve canal—isn't that right?

(Testimony of F. G. Niemand.)

A. In the spinal canal.

Q. Yes, in the spinal canal.

A. The thing is that you would have to know that before you did your surgery. [166]

The Court: All right.

Mr. Baraty: Q. Doctor, that doesn't show up now, on those films that you have looked at today?

A. No, I didn't say it did.

Q. I see. To what extent would the injury that you are testifying about now disable a person?

A. Well, now, I don't know how to answer that. What do you mean by that? Could you explain to me what—I am not sure what you mean. Are you trying to ask me whether this injury is going to put him in bed, or what are you driving at, so that I can try to answer it intelligently.

Q. Well, Mr. Graham is a railroad man.

A. You mean, could he do railroad man's work?

Q. No, as a result of this accident here, to what extent would a rupture of a degenerative disc disable a man like that?

A. Well, suppose he had to carry out a 200 pound weight or something; he could lift that weight in carrying it out, but he would be incapacitated in lifting. He would increase the degeneration and increase the pain. He could do something that came up like that, but all he would be doing would be to increase the disability that he has, and therefore he would be incapacitated for any manual labor. So as a sensible process, or shall we say, a scientific process, you would not subject a man like this to that type of work or even to motion.

(Testimony of F. G. Niemand.)

I mean, every minute there is increasing the disability. [167]

Q. To the best of your opinion, the condition depicted by these X-rays, the three that you put on the box and that were offered by counsel for Mr. Graham, could have existed prior to July 6, 1945?

A. Uh-huh (affirmative).

Mr. Emmons: I submit that has been asked and answered, your Honor.

Mr. Baraty: That is all.

The Court: Any further questions of the doctor?

Mr. Emmons: I have some questions here. I will be very brief.

Redirect Examination

Mr. Emmons: Q. Now, doctor, calling your attention to this X-ray, Defendant's C, which is one from the Santa Fe Hospital, does this X-ray show the same crushed disc that the subsequent X-rays show?

A. Oh, yes, to my untrained eye it is apparent; of course, you might say I had seen it from the other ones, therefore I am going to see it in this one. But I can't understand how it could be missed, even in that one.

Q. It is in this one, and you see it?

A. Yes, very definitely.

Q. And could the average practicing attorney—I mean, doctor, practicing his profession, see such an injury in this X-ray?

Mr. Baraty: We will object to that question; it is [168] passing on the testimony of some other doctor and invading the province of the jury.

(Testimony of F. G. Niemand.)

The Court: I will sustain the objection.

Mr. Emmons: Q. It is there; there is no question about it? A. Yes, sir.

Q. Now, in Dr. Williams, report here on the X-rays, in regard to the two that you took, he says that there is again no evidence of fracture.

A. Well, what he says is regards a picture of the lumbar spine, but what he is answering is, that there is no fracture of the spine. He means the bony spine, the osseous portion of the spine.

Q. I see. So that the body of the actual vertebrae, there is no fracture? A. No fracture.

Q. And it is the "doughnut" in this case?

A. Which is the most important thing.

Q. All right.

A. You see, in a complex fracture, you have a fracture of the disc, too, and usually when you have that crushing injury, the flexing, the jack-knife, you crush a vertebra, and you crush discs in that process, and one is as bad as the other. In fact, you usually get both of them at the same time.

Q. Now, doctor, could there be, in your opinion, an impingement [169] of the nerve?

A. There is.

Q. There is an impingement of the nerve?

A. Yes, he has definite evidences, and that is one of our diagnostic findings in these disc things, that when you begin to find changes in the sciatic nerve—you see, because it is impinged and it begins to show the findings of numbness and the changes in skin sensitivity. I mean, that is one of the diag-

(Testimony of F. G. Niemand.)

nostic factors in disc injuries, the changes in either one of the legs, and that causes pressure.

Q. Now, in your opinion, then, the only way to obviate that or to cure it is by means of an operation, is that true?

A. There is no other way. I mean, if you want to cure the man, that is the only way. You can give him a belt and all that stuff, but that is just bunk.

Mr. Emmons: No further questions.

Recross-Examination

Mr. Baraty: Q. There is no crushing of the vertebrae here? A. No.

Q. No fracture of the bone? A. No.

Mr. Baraty: That is all.

Mr. Emmons: No questions.

The Court: Well, doctor, this report that Dr. Williams [170] gave you—you may sit down—it is your interpretation that what he means when he says, “There is again no evidence of fracture,” is that he is referring only to a part of the spine?

The Witness: He is referring to the vertebrae. You see, I asked him for a picture—

The Court: Q. Well, that is your interpretation? A. No, that is what he is saying to me.

Q. But below he says in conclusion, “There is a degenerated lumbosacral disc with a localized degenerative arthritis.” Now, doesn’t he mean in that statement that there is no evidence of fracture any place?

A. No, no, he means that there is no fracture of a vertebral body.

Q. All right.

(Testimony of F. G. Niemand.)

A. Because I asked him for that, for an examination of the spine, and he is not qualified to tell me anything else but that there is a degeneration of the space between there. It is a clinical finding from there on, not a radiological finding. I mean, the numbness of the leg and that sort of thing.

The Court: All right.

Mr. Baraty: Q. Dr. Williams has been a practitioner of good standing in the State of California a long, long time, hasn't he? A. Yes.

Q. Not only as a specialist in roentgenology, but also as a [171] physician and surgeon?

A. No, that is another Williams. This is Bryan Williams.

Q. Oh, I see. Yes.

A. But that is not Francis—you mean Francis Williams.

Q. I am talking about the Williams that took the X-rays.

A. Well, of course, every doctor is licensed as physician and surgeon when he is licensed.

Q. Before he specializes in roentgenology?

A. Yes. Then he is a roentgenologist if he specializes in it.

Mr. Baraty: That is all.

The Court: That is all, doctor.

Mr. Emmons: No further questions.

The Court: You may be excused.

Mr. Baraty: Will Mr. Graham please take the stand for further cross examination?

GEORGE H. GRAHAM

resumed the stand.

Cross-Examination—(Continued)

Mr. Baraty: Q. Mr. Graham, when you talked with Mr. Lewis, the claim agent at Needles, about the possibility of settling your claim, didn't he tell you that there was nothing [172] that could be done by him, because you had a lawyer in Los Angeles looking after it?

A. Something along that line.

Q. Something along that line. And what was the outcome of that?

A. Well, I told him that there was nobody representing me and to send a wire in there and inform them to that effect.

Q. You told who to send a wire?

A. Mr. Lewis.

Q. Mr. Lewis. Didn't Mr. Lewis tell you to send a wire?

A. He said he would send it; it wrote one out. I don't know if he sent it or not.

Q. Didn't you go to the Western Union Telegraph Company and send a duplicate wire to Mr. Irwin, who was then chief claims adjuster in Los Angeles, and another one to Mr. Tomkins, your attorney in Los Angeles? A. No.

Q. I am directing your attention to a wire that I have in my hand, a Western Union telegram dated—from Needles, California. The only date I can find on it is September 26, 1946. Would you please read that over and tell me whether that refreshes your recollection as to that? Can you

(Testimony of George H. Graham.)

tell whether or not such a telegram was sent by you?

A. I don't remember sending that telegram.

Q. You don't remember sending this telegram to Mr. Robert Irwin, [173] and a duplicate of it to Mr. Tomkins in Los Angeles on or about the 26th of September, 1945?

A. No, I don't remember that.

Mr. Baraty: Well, I ask that this be marked for identification as Defendant's next in order.

(Telegram dated 9/26/45 was thereupon marked Defendant's Exhibit E for identification.)

Mr. Baraty: Q. I am showing you a letter under date of September 26 on the letterhead of Emmett A. Tomkins, attorney at law, in Los Angeles, which I have just shown your counsel addressed to the A.T.S.F. Railroad and ask you to just read that over and see if that refreshes your memory concerning the sending of a telegram by you discharging Mr. Tomkins.

A. I don't remember this either.

Mr. Baraty: The document just given me by the witness, - I will ask that that be marked as Defendant's next in order for identification.

The Clerk: Exhibit F.

(Letter dated 9/26/45 was thereupon marked Defendant's Exhibit F for identification.)

Mr. Baraty: Q. Do you know the signature of Mr. Emmett A. Tomkins, I think is his name—yes, Emmett A. Tomkins?

A. No, I wouldn't know it.

(Testimony of George H. Graham.)

Q. Well, he was your attorney in a former action that you filed in the Superior Court in Los Angeles, wasn't he? [174]

A. Well, I still don't think I would recognize his signature.

Q. I see. Well, now, then, you went to Los Angeles on the 30th of September as a brakeman on a passenger train—or was it as a switchman?

A. Well, I don't know; I went in there. If you have a record there, I must have, because I don't know just offhand what date I went in or what date I worked.

Q. The first time you went in to Los Angeles after this accident, about the time you made a settlement with Mr. Hitchcock in Los Angeles you went in as a paid job?

A. Well, I wasn't aware of that until you called my attention to it. If you have a record of it, it must be true.

The Court: No, all he wants to know is when did you go to Los Angeles in connection with the settlement of your case? Did you go as an employee of the company, either as a brakeman or as a signalman on a passenger train?

The Witness: Yes.

The Court: Q. Is that right?

A. Yes, I went in, but I didn't remember when.

Q. Well, not speaking about the date, just the fact that when you did go in, whenever you went in, you went as a brakeman on a passenger train, is that right?

(Testimony of George H. Graham.)

A. I don't remember. I thought I went in on a pass. I couldn't remember that.

The Court: Oh, he doesn't remember. [175]

Mr. Baraty: All right.

Q. Now, when you got to Los Angeles, did you go to the office of the Santa Fe Railroad Company at 6th and Main? A. I went up there.

Q. And you went up there of your own volition?

A. Yes.

Q. Nobody invited you there?

A. No, I went up there to see what could be done.

Q. Yes. And you went up there and sought Mr. Hitchcock? A. I did.

Q. In the claims department?

A. That's right.

Q. Mr. Hitchcock sits here in court now; do you recognize him?

A. Well, he looks a lot older. I wouldn't know him on the street.

Q. Don't we all?

A. I wouldn't know him on the street.

Q. All right. You mean to be pleasant, but anyway, that was the first time you saw Mr. Hitchcock?

A. No, I had met Mr. Hitchcock once before.

Q. Oh. Well, you knew him by sight or by having done business with him before?

A. The last time I saw him was on that date we were talking about.

Q. I see. Well, then, what did you say to him

(Testimony of George H. Graham.)

when you saw [176] him in reference to this matter? Did you explain why you were there?

A. Yes, I believe I did.

Q. Tell us about it.

A. Well, I don't remember what I said. I just probably told him I was in there to make a settlement so I could go back to work or something. I don't remember; that is so far back.

Q. Yes. Well, that is what the purpose was, isn't that right? A. That's right.

Q. And in a businesslike way, why, you two gentlemen settled this case?

A. Well, we got together on it.

Q. Yes. Now I am showing you a document that is dated October 1, 1945, bearing the signature "G. H. Graham," and I ask you if you ever saw that document before. A. Yes, I have seen it.

The Court: Q. Is that your signature on it?

A. Yes, sir.

The Court: Do you want to offer it in evidence?

Mr. Baraty: I do.

The Court: All right, mark it in evidence.

(Document dated 10/1/45 referred to was received in evidence as Defendant's Exhibit G.)

Mr. Baraty: Q. And with this document you received this check in the sum of \$1,050 payable to yourself. Tell us [177] whether it bears your endorsement. A. That's right.

Mr. Baraty: We will offer this check in evidence as Defendant's exhibit next in order.

(Check for \$1,050 referred to was received in evidence as Defendant's Exhibit H.)

(Testimony of George H. Graham.)

Mr. Baraty: Q. What does the "H" stand for in your name? A. Howard.

Mr. Baraty: I would like to read these documents to the jury, your Honor; they are not very lengthy.

The Court: All right.

Mr. Baraty: Defendant's Exhibit G reads as follows: First there is the claim number, giving the draft number, and entitled "Atchison, Topeka & Santa Fe Railroad Company, Coast Lines, Release in full, for the sole and only consideration of \$1,050, the receipt of which is hereby acknowledged, I hereby release and forever discharge the Atchison, Topeka & Santa Fe Railroad Company, Coast Lines, its agents and employees from any and all claims and demands which I have now or may hereafter have on account of any or all injuries, including any injuries which may hereafter develop as well as those now apparent, sustained by me at or near Needles, California, on or about July 6, 1945, while employed as brakeman; also for loss or damage to personal property. In making this settlement, I am not relying upon any statement made by any agent or official of said [178] company as to what my injuries are or how serious they are or when or to what extent I may recover therefrom. It is definitely understood that in making this settlement, no promise or representation has been made relative to future employment.

"I have read the above release and understand

(Testimony of George H. Graham.)

the same. In Witness Whereof, I hereunto set my hand and seal this first day of October, 1945.

“G. H. Graham.”

Then the word “Seal” and the word “Witnesses”, then names “Rosalie Dondero” and “F. H. Hitchcock.”

Mr. Baraty: Q. By the way, Mr. Graham, the words “I have read the above release and understand same,” is that written in your own handwriting? A. You mean this signature?

Q. No, above the signature.

A. Oh, this right here?

Q. Yes, “I have read—”

A. Yes, that is my handwriting.

Q. That is your handwriting? A. Yes.

Q. Now, this check for \$1,050, you cashed that in due course and the money became yours?

A. How's that?

Q. The money became yours, you took the money? A. Yes, I took the money, sure.

Q. And you never gave it back to the railroad company? A. No.

Q. And in the month of November, 1947, did you have \$1,050 ready to return to the railroad company? A. I did.

Q. Where was it?

A. Well, I could get my hands on it real quick.

Q. I know, but I say, did you have it? You said you did. Now where was it?

A. Searchlight, Nevada.

Q. In whose possession? A. Mine.

(Testimony of George H. Graham.)

Q. Was it in the bank? A. No.

Q. Was it in somebody else's name?

A. Well, I could get ahold of it. I have a few connections up there that I could get it.

Q. Do you mean you would have to borrow it?

A. Well, I didn't have to borrow it but I didn't have it in the bank and I didn't have it all together in one spot. But I could get it together. That is what I mean.

Q. Well, you didn't have it in the bank; did you have it in money or greenbacks or anything?

A. Money.

Q. Well, where was it? [180]

A. Well, if I tell you, you might go out there and find my plant, or something.

Q. That's right. Maybe you can accuse me of that. But you are the only one that can do that. But you can't tell us where you have this money?

A. Well, I had it within a reasonable place.

Q. What does that mean?

A. I might have had some in my house.

Q. No, tell us where you had it, not where you might have had it. Where did you have it?

Mr. Emmons: He said some in his house.

Mr. Baraty: He said that he might have had some in his house.

A. I had some in the house, if you want to know. I wasn't completely broke.

Mr. Baraty: Q. Did you have \$1,050 in your house?

A. Not at one time, no. I don't believe I did. But I could get it.

(Testimony of George H. Graham.)

Q. How much did you have in your house?

A. Oh, I don't know.

Q. You don't know? A. \$400, \$500, \$600.

Q. \$500 or \$600 in the house; is there a bank at Searchlight? A. No.

Q. Is there a bank at Needles? [181]

A. There is a bank at Needles, but I have never been down there—very, very seldom.

Q. That is where you get paid at Needles, isn't it? A. No.

Q. When you work for the railroad company?

A. Well, yes, but I have been away from that railroad a long time.

Q. Since July. Now is there a bank at Boulder Creek?

A. There is one at Boulder City.

Q. Boulder City, I mean.

A. And one at Las Vegas.

Q. Where else? A. Las Vegas.

Q. You didn't have any account in any of those places? A. I did have in Las Vegas.

Q. You had an account at Las Vegas at the time, in November of 1947?

A. No; '47—well, I had a few chips in there, a little money in there.

Q. How much, what do you mean by "chips"?

A. Two or three hundred dollars, maybe.

Q. What bank? A. The Bank of Nevada.

Q. The Bank of Nevada at Las Vegas?

A. Yes. [182]

Q. Now you never got this money in one lump and went to anybody in the Santa Fe and said,

(Testimony of George H. Graham.)

“Here is \$1,050 that I want to return to you; I am not satisfied with the release?”

Mr. Emmons: I will submit that that is objectionable, if your Honor please, on the ground that there is in the files of this case a written offer to restore \$1,050. It is a matter of record in this case; it is on file in this case.

Mr. Baraty: That is easily prepared, your Honor, but we would like to know if he could comply with that offer, and that is the purpose of these questions. I submit the question now put is proper.

The Court: I will overrule the objection. Will you read it, Mr. Reporter?

(Record read.)

A. Well, I think I wrote my lawyer's office to do that, to—

The Court: Well, what the attorney wants to know is, you never actually tendered the \$1,050 in money to anybody in the Santa Fe?

The Witness: Oh, I may have tendered it, Judge.

The Court: Beg pardon?

The Witness: I have had that much money, yes

The Court: No, no, the lawyer wants to know whether you actually went to anybody in the Santa Fe and offered them \$1,050 in money at any time.

The Witness: I made that request of my attorney. [183]

The Court: Well, now, I think you understand what I am talking about; we know you wrote a

(Testimony of George H. Graham.)

letter, but what the attorney wants to know is, did you take \$1,050 in money down to the Santa Fe and say, "Here, I offer it to you, I want to have this release changed."?

The Witness: I understand you now. No, I didn't.

Mr. Baraty: Q. You didn't do that, and you didn't tell your lawyers to deliver \$1,050 to the Santa Fe Railroad? A. How's that?

Q. You didn't tell your lawyers to deliver \$1,050 to the Santa Fe Railroad, did you?

A. Well, I don't remember just what I did tell them, but something along that line, that I was ready to give the payment back or—

Q. Did you tell your lawyers to deliver \$1,050 to the Santa Fe Railroad?

A. I don't remember.

Q. You don't remember. What is the best memory you have on it? Yes or no.

A. I am hazy on lots of things. I just don't know.

Q. Well, you don't know. Well, isn't it true that you never made any such demand on your lawyers? A. No, that isn't true.

Q. What?

A. I don't believe that is true, no. That I never made any [184] offer you mean?

Q. No, did you ask your lawyers to deliver \$1,050 to the Santa Fe Railroad in November of 1947? A. Yes, I did.

Q. Or since?

A. Well, I don't know just what date it was.

(Testimony of George H. Graham.)

Q. Well, did you ask them any date?

A. I did.

Q. You did? A. I did, I believe.

Q. Where were they going to get the money?

A. Well, I could get the money for them, some way.

Q. Did you tell them that you were going to get the money and then that you would send it to them and they were going to deliver it to the railroad?

A. Well, I guess that would be the procedure.

Q. The fact of it is that you didn't have \$1,050 to return to the railroad—

Mr. Emmons: I will submit that that is argumentative, your Honor.

Mr. Baraty: Q. (Continuing) —at any time?

Mr. Emmons: Just a moment. I submit that that is argumentative, your Honor, and has been asked and answered.

The Court: You have asked it before, counsel.

Mr. Baraty: I know I did. We have a witness here who is [185] evasive, and I think we ought to get a—

Mr. Emmons: Well, that is your opinion.

The Court: Well, counsel, you have already asked him those questions, counsel. You can ask in detail as to where he had the money, if he did have it.

Mr. Baraty: Q. How long before November, 1947, did you have \$1,050 to return to the Santa Fe Railroad Company?

Mr. Emmons: I will submit that is immaterial,

(Testimony of George H. Graham.)

your Honor, as long as he had it at that time.

Mr. Baraty: I think it is preliminary to another question I am going to direct to him, and I think it is a fair question to ask, your Honor, under the circumstances here.

The Court: Well, I think you have already covered it, but I will overrule the objection.

The Witness: Could you repeat that, please?

Mr. Baraty: Will you read that, Mr. Reporter?

(Record read.)

A. I don't know offhand. I have a little money, as I say, and I have a couple of friends in Las Vegas. I could have got probably two or three times that amount, if you want to come right down to the fact of it. I have some friends, yes.

Mr. Baraty: Q. Did you have that amount of money at the time you filed the complaint, August 30, 1946?

A. No, I don't believe I did. Not that much. But I had three or four hundred dollars on me.

Q. And you weren't in a position to obtain it in August, 1946, as well as you were in November of 1947?

A. Well, I could go and get it.

Q. Well, could you get it in August of 1946, when you filed the complaint in this court?

A. Yes, I believe I could.

Q. You didn't try, though?

A. I went to Las Vegas and got—

Q. You didn't try?

A. Well, it didn't come to a showdown.

Q. Now, after going to Los Angeles on Sep-

(Testimony of George H. Graham.)

tember 30, 1945, on second 23, and after signing that release and obtaining from Mr. Hitchcock the \$1,050, did you go back to work for the railroad company? A. I did.

Q. And on February 16, 1946, were you dis-

A. Most all the month of October.

Q. And a portion of November?

A. A portion of November.

Q. In December of 1945 you were in the hospital part of the time? A. That's right.

Q. And you worked a portion of January of 1946? A. That's right.

Q. And on February 16, 1946 you were discharged from the [187] railroad company for a violation of Rule G?

A. That occurred, but there was no doctors' sobriety test or nothing taken.

Q. You were discharged from the railroad company for a violation of Rule G, were you, Mr.—?

A. That is what they put on the discharge.

Q. You were granted a trial on that, were you not?

A. Well, I wouldn't call it an investigation; it was a—I would like to ask my lawyer to answer that.

Q. Well, you were discharged anyway, on that day? A. I was discharged.

Q. I would like to read you, out of the rules of the Santa Fe Railroad Company, Rule G.

Mr. Emmons: If your Honor please, I will object to that on the ground it is incompetent, irrevelant and immaterial, and even if admitted,

(Testimony of George H. Graham.)

would tend to prove no issue in this case.

Mr. Baraty: It was brought out on direct examination, and without the aid of the rule, it doesn't mean anything.

The Court: I will overrule the objection.

Mr. Baraty: (Reading) "Rule G. The use of intoxicants or narcotics is prohibited."

Q. Now, Mr. Graham, do you admit or deny that you received from the Santa Fe Railroad Company for services rendered by you to the company in the month of January 1945 the sum of \$284.67 [188] and no more?

A. In January 19 what?

Q. '45.

A. Well, I have earned more than that.

Q. No, in that month.

A. Well, I couldn't say because I haven't got my old time slips.

Q. You can't say whether that is true or not true?

A. Well, I have earned more. I can't say just what I earned in the month of January because I have no way of proving it or checking it.

Q. Would you say that it is true that in 1945, the month of February, you received \$235.27 for services rendered that month to the company?

A. I think that it a little bit shy there. I think I made more than that. I worked pretty steadily.

Q. Well, I will read you these all at once and ask for your reply.

Mr. Emmons: If your Honor please, at this time may I object to this as not having proper

(Testimony of George H. Graham.)

foundation; the proper procedure would be to bring that man from the railroad company who prepared these and if those are the correct records, to establish that fact and let it go along with the record. This is taking up the time of the Court and jury.

Mr. Baraty: I don't want to do this, and your Honor knows the way these things are ordinarily proved—it is usually just [189] by stipulation. But this matter of the amount of money this man made was brought out on direct examination, and I think I am entitled to cross examine him on that and see if it—we have had a great deal of difficulty, your Honor.

The Court: I will overrule the objection. You may proceed.

Q. (Mr. Baraty): Will you say that it is true or not true, that in the following months you received the following amounts that I am about to indicate to you from the Santa Fe Railroad Company for services rendered by you to the company? Now we can eliminate the first two months that I have already mentioned. You have answered as to those.

In March of '45 \$384.28; April of '45, \$346.76; May of '45, \$424.23; June of '45, \$382.95; July, 1945—that is the month of the accident—\$75.20; August, nothing; September, 1945, \$90.95; October, 1945, \$213.44; November, 1945, \$156.53, plus some back or vacation pay of \$40.44; December, 1945, nothing; January of 1946, \$66.67.

Now, is it true or untrue that you received those amounts for those months from the company?

(Testimony of George H. Graham.)

A. In September, that is untrue.

Q. \$90.95?

A. I couldn't have possibly made that in one trip or one day, and I am sure I didn't work at all in September—maybe one day, or I don't know what. But—— [190]

(Conversation among counsel outside hearing of reporter.)

Mr. Baraty: All right, Mr. Smith draws my attention to sheets which are entitled "Train and Engine Men's Time Sheet." Thereon it is shown that on September 30, on Second 23, with Dressler, Engineer, the witness earned \$11.25.

Q. That is the time you came into Los Angeles in September and you were paid—

Mr. Smith: That was hours, 11 hours and 20 minutes.

Mr. Baraty: Excuse me. That was wrong. What is it?

(Conversation between Messrs. Smith and Baraty outside hearing of reporter.)

Mr. Baraty: Let me revamp that question.

Q. Is it true that on September 30, 1945, when you came in on Second 23 with Dressler as engineer, with a total of 11 hours, 25 minutes, you were paid for those services the difference between \$90.95 and \$76.72, about \$14?

A. Well, I don't remember the transaction, but if I went to work that day, I must have worked.

Q. That is the only day you worked in September

A. Must have been.

Q. And is this such as to refresh your memory,

(Testimony of George H. Graham.)

that \$76.72 was for vacation pay coming to you?

A. I had some vacation pay coming.

Q. Well, yes.

A. But I don't remember when I got it. [191]

Q. And if I tell you that those two totals, the 11 hours, 25 minutes that you took to come to Los Angeles that day on the 30th on the train as a brakeman, the \$76.72 total, \$90.95 in September, 1945, would you say that is true?

A. If you have got it, it must be; but I don't remember that, and I couldn't earn that much money in one day.

Q. No, but you could earn \$14.00 in one day on that trip, 11 hours? A. That's right.

Q. And the difference, \$76—don't you know how much back pay you had for vacation coming to you?

A. Well, I haven't got all that stuff. I have lost some in a fire, and I don't know.

Q. Well, you wouldn't concede, then, that what I am asking you here is correct, from the company's books?

A. Yes, but I worked only one day. If I worked that day, I couldn't have earned no \$76 on vacation pay. If that came, that is something else.

Q. I agree with you, sir; I am telling you only that you earned just \$14 that day. The rest was for vacation pay coming to you.

Mr. Emmons: If Your Honor please, if counsel is going to testify, I think he should take the witness stand and be sworn.

Mr. Baraty: I am cross-examining the gentleman.

(Testimony of George H. Graham.)

The Court: Well, you have spent quite a little time on [192] it.

Mr. Baraty: Yes, I know; Your Honor is very patient and I perhaps do take too long.

Q. May I inquire for the year 1944. I will read these things and when I am through I want you to tell me to the best of your memory if it is the true amount of what you received for your services for that period of time from the company.

January, 1945, nothing; February—these are all 1944—February, \$150.80; March, \$305.23; April, \$302.34; May, \$359.07; June, \$343.78; July, \$305; August, \$344.88; September, \$362.93; October, \$417.14; November, \$513.69; December, \$348.73. Making a total of \$3,753.59 paid you for services rendered in 1944. Is that true?

A. That is more or less along there because I have——

Q. That is about right?

A. Yes, that is about right.

Mr. Emmons: What is that total, counsel?

Mr. Baraty: \$3,753.59.

Q. Now, have you ever had any other injuries or sustained any other injuries while working for any of the other railroads you were working with?

A. How's that?

Q. Have you ever hurt yourself before?

A. No, sir, outside of my brken hand.

Q. And did you ever hurt your elbow? [193]

A. Well, that was broken years and years ago.

Q. How long back?

(Testimony of George H. Graham.)

A. Oh, maybe 20 years.

Q. Who were you working for then?

A. Myself.

Q. What was that, in Mexico?

A. In Tampico, Mexico.

Q. And did you ever have trouble with headaches or nervous spells? A. No.

Q. Do you recall filing an action against the Atchison, Topeka & Santa Fe Railroad Company in the Superior Court of Los Angeles in November of 1944 for an injury claimed to have occurred near Seligman, Arizona?

A. I remember that.

Q. I have just shown your counsel a certified photostatic copy of the complaint that I have mentioned, and I ask you whether your signature appears on the last page, what we lawyers call the "verification."

A. That is my signature.

Q. Yes. Sworn to?

Mr. Emmons: May I object to this on the ground, Your Honor, that it is incompetent, irrelevant and immaterial, has no tendency to prove any fact in issue in this case.

Mr. Baraty: We are attempting to prove the existence of [194] prior injuries to this gentleman that occurred at the date mentioned in his sworn complaint here, some time in 1944.

The Court: What do you intend——

Mr. Baraty: We are going to offer it in evidence.

The Court: What is the materiality of this? He

(Testimony of George H. Graham.)

said something about a broken wrist, I understood.

Mr. Baraty: No, I want to ask him concerning the injuries he speaks of here, some of which are similar to the ones——

The Court: Well, let me see the complaint.

Mr. Baraty: Yes, sir. May I direct your attention to paragraph 4. It is important.

The Court: Well counsel, I don't see the materiality of that. What has that got to do with this case? He said he was bruised. He alleged in this complaint that he was bruised and that he hurt his hand.

Mr. Baraty: They are alleged to be permanent in this case in their duration.

The Court: Well, every lawyer that files one of these complaints always puts that in there.

Mr. Baraty: Your Honor, this is not a lawyer who verified; it is verified——

The Court: Well, I don't think that there is anything material to it. I will sustain the objection. There is nothing proper presented in that matter.

Q. (Mr. Baraty): Did Mr. Emmett A. Tomkins—— [195]

The Court: It is very obvious that even though a person gets bruises and burns and some lawyer says in a complaint that they are permanent, that they are not always. You could question the witness about that if you wished, but I don't think that that document is admissible.

Mr. Baraty: Well, I was hesitant to do something Your Honor didn't want me to do, but I will accept your invitation and question him.

(Testimony of George H. Graham.)

Q. What injuries did you sustain at the time of the accident at Seligman, the date of which appears as November 16, 1943? A. Broken hand.

Q. Did you sustain any shock, severe and permanent shock, to your nervous system?

A. No, I was kind of hit here, and I hit the edge of the caboose where the cupola of the caboose was, due to that slack action.

Q. Do you have any bruises on your head?

A. No.

Q. On your body? A. No.

Q. On your person?

A. No, just my hand was broken.

Q. Did you break and injure your hands or only one hand? A. One hand.

Q. One hand. [196]

Mr. Emmons: If Your Honor please, we are not trying that case here and I submit it is incompetent, irrelevant and immaterial, what took place at that time.

The Court: Well, counsel, Mr. Baraty intimated that he thought there was some similarity to the injuries involved, so I thought and I suggested that he could examine the plaintiff as to what injuries he did suffer then.

Q. (Mr. Baraty): Well, did you have any headaches as a result of that accident of 1943?

A. No, no.

Q. And is this Los Angeles case numbered 479538 the one which you said yesterday you had long since directed your attorney to dismiss?

(Testimony of George H. Graham.)

A. I can't get all that.

Q. Is this the case that you testified to yesterday, that is pending in the Superior Court of Los Angeles County, numbered 479538, that you instructed your attorney, Emmett A. Tomkins, long ago to dismiss?

A. I told Mr. Tomkins to withdraw the case and to give me my papers back, which he did.

Q. So those were your instructions?

A. Those were my instructions to him. I talked to him verbally.

Q. You stand on that today?

A. How's that? [197]

Q. You stand on that now?

A. I have always stood on it.

Q. Good. Mr. Smith suggests to me something that I forgot. When did you tell Mr. Tomkins to dismiss this action in Los Angeles?

A. Oh, I don't remember the date.

Mr. Baraty: I would like to have that marked for identification, Your Honor, as Defendant's next in order, inasmuch as we have been talking about it.

(Certified copy of complaint referred to was marked Defendant's Exhibit I for identification.)

Q. (Mr. Baraty): Now, what work have you been doing since you left the service of the Santa Fe? A. None at all.

Q. Have you been doing any manual labor at all? A. None.

(Testimony of George H. Graham.)

Q. Do you own or have you an interest in some gold possibilities there in——

A. I have got some gold property up there, yes.

Q. Is it assessment property?

A. How's that?

Q. Assessment property that you have to do a certain amount of work every year?

A. Well, I haven't had to do any of that work, due to the moratorium on intentions to hold. We don't have to do any, and [198] since I have had that property and the former tenant's claim, I have to pay the taxes on it.

Q. And you have done no labor on it at all?

A. No.

Q. Haven't got anything off of them?

A. No, I haven't. I have had several matters come up; I thought I had a sale, but it hasn't materialized, so that the thing is just rocking along.

Q. Do you live up there?

A. I live there.

Q. How long have you lived there?

A. Oh, I have been out there at the mine since November.

Q. You live there with Mrs. Graham or by yourself?

A. Oh, she is out there.

Q. How far away is that from Searchlight?

A. Oh, about two miles from Searchlight.

Q. So you haven't any place for living in Searchlight, but it is out at the mine?

A. It is out at the mine.

Q. I see. Now, you went back to the Santa Fe

(Testimony of George H. Graham.)

Hospital, did you, the Hospital Association in Los Angeles on December 14, 1945?

Mr. Emmons: I submit, Your Honor, that that has been asked and answered several times.

The Witness: December 10. [199]

The Court: Yes, you have asked him that several times.

Mr. Baraty: I am just laying a foundation for the question I want to ask next; I want to show what his complaints were.

The Court: Well, ask him that.

Q. (Mr. Baraty): At that time did you give your complaints, reading as follows:

“Chills, sore throat and a fever of one month’s duration, slight nausea of one month’s duration and cough. Patient has had some chilly sensations, headaches, sore throats, a fever for about one month. There is also slight nausea when he eats. Patient has been treated in outpatient department, decided to be admitted to house.”

Did you give that history when you went to the Santa Fe Hospital Association?

A. Well, I was having a high fever and throat trouble.

Q. Yes.

A. And Dr. Holtz treated me and Dr. Price, under the instructions of Dr. Morrison. But Dr. Holtz told me—I complained of pain in my back, and I told Dr. Keeney it was a severe pain and Dr. Holtz told me he wasn’t treating me for my back, he was treating me for my throat.

(Testimony of George H. Graham.)

Q. Yes. No treatment was given you for your back?

A. They gave me some heat treatments.

Q. And you left there on December 20, 1945?

A. That's right.

Q. And you didn't again return to the hospital, did you? A. How's that?

Q. You didn't again return to that hospital?

A. No, I haven't been back since——

Mr. Baraty: Your Honor, I am showing counsel rather a lengthy document. I don't know what your pleasure is about adjournment.

The Court: Well, have you more cross-examination?

Mr. Baraty: Well, a little more, but I don't think I would be finished by 4:15. I wouldn't be long in the morning.

The Court: Well, how many witnesses has the plaintiff got?

Mr. Emmons: I have one more, Your Honor.

The Court: Short or long?

Mr. Emmons: I don't anticipate it will be more than a half hour.

The Court: Well, that is pretty long.

Mr. Emmons: I mean for both direct and cross.

The Court: How long for the defendant?

Mr. Baraty: We will have a doctor; we have scheduled him for 11:15 tomorrow, and we have to accommodate him if we can.

The Court: Yes, that is all right; we shall do that.

Mr. Baraty: And we have three short witnesses.

(Testimony of George H. Graham.)

The Court: Well, do you think all the evidence could be [201] completed tomorrow?

Mr. Baraty: I don't think there is any question about it, Judge.

The Court: Would you prefer to take an adjournment, both sides?

Mr. Baraty: I would, if it is agreeable.

Mr. Emmons: Very well.

The Court: I try not to keep juries later than 4:30, because you have some from Richmond and Oakland and Berkeley and all over, and transportation is difficult, I know.

We will take a recess until tomorrow morning at 10:00 o'clock, ladies and gentlemen. Please bear in mind the admonition I have given you.

(Thereupon an adjournment was taken until tomorrow, Thursday, August 19, 1948, at 10:00 o'clock a.m.)

Morning Session, Thursday, August 19, 1948, 10:15

The Clerk: Graham vs. The Santa Fe Railroad, on trial.

Mr. Baraty: The defense is ready.

Mr. Emmons: Ready, Your Honor.

GEORGE H. GRAHAM,
the plaintiff herein, resumed the stand.

Cross-Examination (Continued)

Q. (Mr. Baraty): Mr. Graham, I have just shown to your counsel a letter under date of February 20, 1946, at Needles, California. I am showing it to you and I ask you if that is your signature on that letter.

A. I have a copy of that letter.

(Testimony of George H. Graham.)

Q. That is your signature to that letter?

A. That's right.

Mr. Baraty: We offer this in evidence as Defendant's Exhibit next in order and ask leave to read it to the jury.

Mr. Emmons: If Your Honor please, I will object to that on the ground it is incompetent, irrelevant and immaterial, tends to prove no issue of fact in this case, and ask that it be stricken.

Mr. Baraty: This is cross-examination, Your Honor. It has to do with injuries claimed here, some of them.

(Document handed to Court through Clerk.)

The Court: I will overrule the objection. [203]

(Letter dated 2/20/46 referred to was received in evidence and marked Defendant's Exhibit J.)

Mr. Baraty (reading):

"Needles, California, February 20, 1946.

"Mr. A. J. Smith

"Superintendent, A. T. & S. F. Ry.

"Needles, California.

"Mr. E. C. Charles, Claim Adjuster, A. T. & S. F. Ry.

"Needles, California.

"Gentlemen:

"On December 12, 1944, I was called at 1:00 a.m. for 1:35 at Needles for a westbound freight train. I drove my car into a garage which I was renting monthly from brakeman Ambron, which was located about two blocks from where I live. After I had placed the car in this garage and locked

(Testimony of George H. Graham.)

the garage door, I had an altercation with a Santa Fe engineer and there were some blows struck. This engineer at the time was in the company of another man. After this altercation I left and walked up Front Street and crossed over from the Reading Room to the high sidewalks, continued on down to a point opposite the Santa Fe ticket office, when a man by the name of H. D. Flacklam, a Santa Fe brakeman, jumped out from behind a palm tree by the ticket office and struck me a blow alongside my head and also one over my left eye, cutting my forehead. [204] The only witness was a colored man who called the Santa Fe special agents. I don't know this colored man's name. I tried to defend myself, but this man ran away after striking me.

"A Santa Fe special officer encountered me in front of the trainmen's board, outside of the crew dispatcher's office. While he was questioning me as to my trouble with this man, Conductor C. G. Rogers came by. This is the conductor I was called to go out with—my regular conductor. Rogers asked me what the trouble was and I told him what happened and he advised me to go to the hospital and have my forehead fixed up. I told him no, I would just wash up my face and go out on my run. The special officer asked me if I would swear out a warrant against this party after I came back from my run and I told him I would. After I came back from my run, I swore out a warrant against Flacklam, but in the meantime he left Needles and went to Los Angeles. About four days later he got off of No. 4 at Needles and was picked up by police

(Testimony of George H. Graham.)

officers on the strength of my warrant. I did not appear at the hearing as I was on the road. This man was given a fine and 60 days' jail sentence suspended for one year.

"This blow, I believe, is the cause of the extreme headaches I have been having since that date. I have not called attention of this matter to the company as I did not [205] want to make any more trouble, but conditions have changed since that time, and I wish to bring the matter to your attention.

"Yours truly, G. H. Graham, Brakeman.

"L. J. Burton, Brakeman, Witness.

"C. G. Rogers, Conductor, Witness."

Q. Mr. Graham, I will ask you if it is not true that on October 29, 1914, at 9 o'clock p.m. while you were working for the Texas & New Orleans Railroad in the yards at Houston, Texas, and employed as a switchman that you did sustain the following injuries:

"Abrasion and slight contusion of right lower jaw, abrasion of right elbow, sprain of right ankle, slight abrasion on lumbar region of back, complains of pain in right shoulder and back, but no other external evidences other than given at present."

Is that a true recital of the injuries sustained by you at that time?

A. I know nothing about that.

Q. You know nothing about that? Did you ever work for the Texas & New Orleans Railroad Company?

A. No, I never have.

(Testimony of George H. Graham.)

Q. I am showing you a document here, sir; I will ask you to look at it, please, and on the second page, tell us whether that is your signature to the affidavit and the document. [206] A. No.

Q. "George Howard Graham," as appears twice on the second page, is not your signature?

A. No, I don't recognize it as such.

Q. Does this document refresh your memory as to whether you had ever worked on the Texas, New Orleans Railway Company? A. No.

Q. Who is Roy V. Kibbee?

A. I don't know him.

Q. Do you know a person by that name? Did you ever know a person by that name, who resided at 622 West 75th Street, Los Angeles, California?

A. No, I don't.

Q. Were you ever married to a lady by the name of Mrs. Lydia Graham? A. No.

Q. Whose residence is given as Denver, Colorado, 1545 West Bayward Street. A. No.

Q. Were you ever employed by the Denver, Rio Grande Railway Company as a brakeman or otherwise? A. No.

Q. Is it or is it not a fact that the date of your birth is August 1, 1888? A. No. [207]

Q. Is it or is it not a fact that you were born at Chippewa Falls, Wisconsin? A. No.

Q. That is not true? A. That is not true.

Q. What date were you born?

A. August 1, 1897.

Q. August 1, 1897? A. That's right.

(Testimony of George H. Graham.)

Mr. Baraty: Your Honor, I would like to ask the witness to step down to the table and write the name "George Howard Graham."

Mr. Emmons: I submit that that is improper cross-examination.

Mr. Baraty: I don't think it is.

Mr. Emmons: No proper foundation has been laid.

The Court: What is this, with reference to some injury or injuries in 1914?

Mr. Baraty: No, in reference to——

Mr. Emmons: The whole thing is incompetent, irrelevant and immaterial.

Mr. Baraty: No, in reference to the matter of employment with this railroad, and the possible injuries, and also as to the matter of his age.

The Court: In 1914 those injuries were? [208]

Mr. Baraty: Yes, and the matter of his age. This document is signed on October 17, 1914.

Mr. Emmons: The matter is too remote.

The Court: Yes, I think the matter is too remote.

Mr. Baraty: May I point out to Your Honor that with the claim of permanent injuries here, we are concerned with a matter of the man's age, and there are some matters of identity that will develop later, too, and that is why I say that we are concerned with his statement, or a person's statement as to what his age might have been, no matter when. I ask permission now to ask him to sign his name, "George Howard Graham."

Mr. Emmons: Why, if Your Honor please, if

(Testimony of George H. Graham.)

the man signs his name now, how could there be any similarity to the name signed in 1914?

Mr. Baraty: That is a matter for the jury.

Mr. Emmons: Well, if that is a matter for proof, let's have expert proof on it. I think the whole matter——

Mr. Baraty: Otherwise we can't have any basis for that, Your Honor.

Mr. Emmons: I think the whole matter is too remote.

Mr. Baraty: I submit, Your Honor, that we are entitled to it.

The Court: Well, you have the signature on that document here that is already in evidence.

Mr. Baraty: It looks to me, Your Honor, that we are [209] entitled to know the identity of this man and the date of his birth.

The Court: Well, that may be so, but I think that is too remote and vague to ask a man for his signature now and then refer that or compare it to an alleged signature of someone having the same name—maybe the same man—I don't know—34 years ago. That is too remote.

Mr. Baraty: We have got the same date of birth—as to the month and day as he has testified to here, August 1. We have a different year date, and we have a different place of birth. Now we are trying to find out on cross-examination whether the testimony that he has given here as to his identity, as to his birth, as to his place of birth, is true or whether some other thing is true.

Mr. Emmons: He has already denied all those

(Testimony of George H. Graham.)

things, Your Honor, and that should be sufficient. It is now up to them to prove it otherwise, if they can. Secondly, this whole matter is so far remote when they go back to the very first day of his birth, to try to dig up something which they can pin on this man. Secondly, that is too far remote.

Mr. Smith: The reason, if the Court please, that we would like to have Mr. Graham write his full name is that we don't have an example of his signature and his full name. The release which he signed, he signed "G. H. Graham." We think it is the same. However, we think it is for the jury to decide, [210] whether the man that signed this document, giving his age as a matter of four or five years difference, is the same man as Mr. Graham. It is certainly a material point. If counsel in his opening statement says that he is permanently disabled and intends, as he says, to ask the jury to give damages based on some type of life expectancy, it is certainly material to know whether or not the man was born in 1888 or 1897.

The Court: Yes, that is material, but I am in doubt as to the materiality of requiring the witness to sign his name.

Mr. Smith: Well, it would then be something that the jury could decide, whether it was his signature or not. That is a question of fact for the jury, and if they have an example signed "George Howard Graham" as the signature is here, they will be in a position to decide. I mean, if it is not his signature, why, I don't see why he should have any objection to signing it.

(Testimony of George H. Graham.)

Mr. Emmons: Well, I think that is an improper remark to be made by counsel. Why should he have to sign his name when it is not required of him to do so?

The Court: Well, the only materiality of this matter is a matter of age, so far as I can see.

Mr. Emmons: To go back and get his signature when he was ten years old and require him to sign his name and compare it, that is too far remote.

Mr. Baraty: We are not asking him for that. We have a [211] discrepancy, as Mr. Smith points out, of nearly ten years.

The Court: Well, that is the same matter. Do you intend to present any other evidence on the subject?

Mr. Baraty: Well, the question is pending before you now in order to reach the point, the matter of having his name. We have further documentary evidence that we will produce as we go along on this subject. So, do you want to reserve ruling on that for a moment?

The Court: Well, if it is merely a question of age, I consider the incident that is referred to as being too remote in point of time to be a matter that the jury could properly consider. But, of course, the matter of the man's age is in issue, and it is pertinent to this proceeding.

Mr. Smith: If the Court please, in addition to that, on the matter of the injury about which he was questioned, we will produce medical testimony that the injury which he suffered or claims to have suffered from at this time could have resulted, or

(Testimony of George H. Graham.)

arisen in childhood. That will be the medical testimony which will be produced.

The Court: Well, that is a matter of medical testimony, but that has nothing to do with this matter.

Mr. Smith: And the first question that Mr. Baraty asked him was whether he had suffered an injury in 1914 while working for the Texas & New Orleans Railway, and which injuries included an injury to the lumbar region of the back. Mr. Graham denied [212] that and denied ever working for the Texas & New Orleans Railway. Now it certainly bears on his credibility to determine if he did work for the Texas & New Orleans Railway and when our medical testimony will also be to the fact that the back condition which he has now may date back to childhood, it is relevant to know that, if it could date back to this period of 1914.

Mr. Emmons: I submit that is too remote, Your Honor. He may have had countless injuries during his lifetime. It is certainly incompetent, irrelevant and immaterial in this case. It is not material.

Mr. Baraty: Well, does Your Honor desire to reserve his ruling on writing his name, or do you want to rule on it?

The Court: I will see what the evidence shows further. For the time being, I will sustain the objection, and you may renew your request later.

Mr. Baraty: We offer this document as Defendant's next in order for identification.

(Testimony of George H. Graham.)

(Personnel record dated 10/17/14 was there-upon marked Defendant's Exhibit K for identification.)

Q. (Mr. Baraty): Mr. Graham, you have testified here that you were never employed by the Santa Fe, the Atchison, Topeka & Santa Fe Railway, before your employment in 1943?

A. How's that.

Q. You stated here yesterday under oath that you were never employed by the Santa Fe Railway Company, the Atchison, Topeka [213] & Santa Fe before your employment in 1943?

A. I testified to that, yes.

Q. What?

A. I believe that question came up.

Q. Well, you so testified? A. I did.

Q. I am placing in your hands some documents I have just shown your counsel and they consist of an application for situation, a surgeon's certificate, and a brakeman's examination. I will place them in your hands for your perusal and ask you if that happens to refresh your memory on the question of your first employment with the Santa Fe.

A. I don't know anything about this.

Q. May I show you on the last page of what is marked "Application for Situation," dated June 16, 1916, and tell us if the signature on the first place is "George Howard Graham"—that is not too legible, but another place it is "George Howard Graham." Tell us if that is your signature. The first one is here, which is not too legible, and the second one is there.

A. No.

(Testimony of George H. Graham.)

Q. That is not your signature? A. No.

Q. Do you recall taking an examination as a brakeman for the Santa Fe on August 10, 1916?

A. No. [214]

Q. It is not true that you were born in Chipewa Falls, Wisconsin, then, is it? A. No.

Q. You don't know anybody, or you have never known anyone by the name of Roy C. Kibbee, who resided at 622 West 75th Street, Los Angeles, California? A. No, I don't.

Q. Isn't he a cousin of yours? A. No.

Q. Were you in the year 1916 married to a lady by the name of Jessie Graham? A. No.

Mr. Baraty: We will ask that these documents be marked as Defendant's Exhibit for identification next in order.

(Employment record dated 1916 was marked Defendant's Exhibit L for identification.)

Q. (Mr. Baraty): Were you in the year 1917 employed by the Galveston, Harrisburg & San Antonio Railway Company? A. No.

Q. I will show you a document that I have just shown to your counsel, where the name "George Howard Graham" appears in signature twice, once before a notary public, and I will ask you to examine that document and see if that refreshes your memory.

Mr. Emmons: Answer out loud, Mr. Graham.

A. No, I don't know. [215]

Q. (Mr. Baraty): That is not your signature that appears on this document? A. No.

(Testimony of George H. Graham.)

Q. Were you born in Denver, Colorado, on August 1, 1890? A. No.

Q. In the year 1917 were you married to a Mrs. Thelma Graham, whose residence was Fresno, California, at 1347 L Street? A. No.

Q. You don't know any such person?

A. No.

Q. In 1917, did you know a person by the name of Roy C. Kibbee, 622 West 75th Street, Los Angeles, California? A. No.

Q. Have you ever worked for the Cripple Creek Short Line? A. No.

Mr. Baraty: We will offer this document for identification as Defendant's next in order.

(Personnel record dated 1917 was marked Defendant's Exhibit M for identification.)

Q. (Mr. Baraty): I am showing you another document, Mr. Graham, that I have just shown to your counsel, which bears the signature, "George Howard Graham," and then the same before a notary public, and I ask you to examine that and tell us whether that refreshes your memory as to whether that is your signature or whether you ever worked for that company. [216]

A. No, I never.

Q. Will you look at the signature on the second page, the signatures, and tell us whether "George Howard Graham" is your signature.

A. No, that is not mine. I never signed that.

Q. And "George Howard Graham" before the notary public at El Paso? A. No.

Q. That is not your signature?

(Testimony of George H. Graham.)

A. No, neither one of them.

Q. Were you born August 1, 1891, at Denver, Colorado? A. No.

Q. In the year 1917—I will withdraw that because you have already answered the question. Did you ever live at 1205 Wyoming Street, El Paso, Texas? A. I didn't hear you.

Q. Did you ever live at 1205 Wyoming Street, El Paso, Texas? A. No.

Mr. Baraty: We will offer this for identification as Defendant's next in order.

(Personnel record dated 1917 was marked Defendant's Exhibit N for identification.)

Q. (Mr. Baraty): Can you tell us by whom you were employed in the year 1914?

A. I wasn't employed, to my memory. [217]

Q. Can you tell us by whom you were employed in the year 1916?

A. No, I couldn't tell you offhand. I don't remember.

Q. Can you tell us by whom you were employed in the year 1917? A. No.

Q. You don't know what type of work you were doing in the years '14—1914, 1916 or 1917?

A. No.

Q. When did you first go into the railroad business?

A. About 1919, 1920, along in there.

Q. And the first job was what?

A. Brakeman.

Q. What company? A. I. & G. N.

(Testimony of George H. Graham.)

The Court: Well, ask him the direct question as to whether he was.

Q. (Mr. Baraty): Were you ever convicted in the United [220] States District Court for the Southern District of Texas, Houston Division, in an act that involved counterfeiting United States money?

A. Yes, but that wasn't a felony conviction.

Mr. Baraty: Well, ask that part be stricken out because the law says it is. The answer that it wasn't a felony conviction, I mean.

The Court: Well, what is the record that you have shown counsel?

Mr. Baraty: There is a felony. There are two pleas of guilty to counterfeiting United States Treasury notes.

The Court: What date?

Mr. Barity (reading): "The cause came on regularly for hearing"—and then it shows the date, Your Honor.

Mr. Emmons: I suggest that you let His Honor read that.

Mr. Baraty: Maybe the Court could find it quicker than I could.

Q. (The Court): In 1936 did you plead guilty to a charge against you in the Southern District of Texas? A. I did.

Q. You served a term in prison?

A. Five months in New Orleans County Jail and \$100, fine.

Mr. Emmons: I submit that is not a felony.

(Testimony of George H. Graham.)

The Court: Well, it is under federal law. You were indicted by a United States Grand Jury on a violation of federal [221] law. The fact that the Judge imposed a sentence less than a year and a day is immaterial.

Mr. Baraty: There was a further sentence, I believe, 18 months suspended with probation for five years on the fourth count.

Mr. Emmons: That is all admitted, Your Honor. That is incompetent.

The Court: Well, I think you have got sufficient.

Q. (Mr. Baraty): May I ask you, in that case, Mr. Graham, if you are not also known as "George H. Graham," and——

Mr. Emmons: If Your Honor please, I will object to that on the ground it is absolutely incompetent to go into details of the commission of any offense.

The Court: Well, I wouldn't permit counsel to do that.

Mr. Baraty: I am trying to get at the question of identity, Your Honor.

The Court: He is apparently identifying him by name.

Mr. Baraty: That is all I want.

The Court: Yes.

Q. (Mr. Baraty): You were not known in that action in the United States District Court, Houston Division, as George H. Graham, G. G. Howard, Howard Graham, Jack Graham, and Graham Howard?

(Testimony of George H. Graham.)

A. No. I never signed my name that way.

The Court: However that may be, he wants to know if that [222] is the way you were indicted down there.

The Witness: Well, I don't know, Judge. I just don't remember.

Mr. Baraty: We will offer this document in evidence, Your Honor.

The Court: Well, if it is **offered in evidence**, that means it has to be read to the jury and considered, and you may only inquire as to the criminal record for impeachment.

Mr. Emmons: I submit it is inadmissible on that ground, Your Honor.

Mr. Baraty: I would like to establish the identity of the various aliases that apparently have been admitted by the plaintiff.

The Court: Is that a certified copy?

Mr. Baraty: Yes, Your Honor.

The Court: Well, you have already read the designations of the defendant in the indictment, and that is in the record.

Mr. Baraty: All right.

Mr. Emmons: I think that is all that is necessary.

The Court: Do you wish to have the witness sign his name now?

Mr. Baraty: Yes, Your Honor.

The Court: All right, put the table up there and let him sign it.

The Witness: Your Honor, I would like to ex-

(Testimony of George H. Graham.)

plain that [223] matter, if you will give me the opportunity.

(Piece of paper and fountain pen handed to witness.)

Q. (Mr. Baraty): George Howard Graham, will you please sign your name?

A. (Witness signed name.)

The Clerk: Shall this be marked for identification, Your Honor?

The Court: Yes.

(Record of conviction referred to was marked Defendant's Exhibit O for identification.)

Q. (Mr. Baraty): Would you please sign "George H. Graham" further down on any line that is convenient? A. (Witness complied.)

Mr. Baraty: Thank you. We will offer this exemplar in evidence, Your Honor, as Defendant's exhibit next in order.

(Signature exemplars referred to were received in evidence and marked Defendant's Exhibit P.)

Mr. Baraty: That is all, Your Honor. It is recess time, I see, and Dr. Soto-Hall is here at our request, and I was going to ask counsel and Your Honor if we could put the doctor on right after recess out of order.

The Court: Very well.

Mr. Baraty: That is all of the witness.

The Court: We will take a recess at this time, ladies and gentlemen. Please bear in mind the admonition of the Court. [224]

(Recess.)

Mr. Baraty: Your Honor, I forgot, but during the cross-examination of Mr. Graham, we forgot to offer in evidence the four applications, so named, and we now offer them in evidence, those which were offered for identification only.

Mr. Emmons: I will object to that on the ground that it is incompetent, irrelevant and immaterial and that they are too remote in time.

Mr. Baraty: We have got signatures for comparison for the jury.

The Court: I will overrule the objection. They may be admitted.

(Defendant's Exhibits K, L, M and N for identification were thereupon received in evidence.)

Mr. Emmons: If Your Honor please, will they be admitted for the sole purpose of comparison of signatures, and not for the contents stated therein?

The Court: Well, if they are admissible for the date, whatever the date of birth, and to that extent they are admissible.

Mr. Emmons: Thank you.

Mr. Baraty: With permission of counsel and Your Honor and the plaintiff, we will go forward now and call Dr. Soto-Hall, because he happens to be here. [225]

RALPH SOTO-HALL

called as a witness on behalf of the defendant, sworn.

Q. (The Clerk): Will you state your name to the Court and jury, please?

(Testimony of Ralph Soto-Hall.)

A. Ralph Soto-Hall.

Direct Examination

Q. (Mr. Baraty): Doctor, where is your office? A. At 350 Post Street.

Q. San Francisco? A. Yes.

Q. And your profession is that of physician and surgeon? A. Yes.

Q. When were you admitted to practice in the State of California? A. 1923.

Q. And since that time you have practiced your profession continuously here?

A. No, I spent several years in postgraduate work after 1923 in Europe and in the East, and then later also I was away four and a half years during the war.

Q. And what institution of learning are you a graduate of?

A. I received my medical degree from the University of California Medical School.

Q. In what year? A. '23.

Q. 1923. [226] A. That's right.

Q. '23? A. That's right.

Q. Now, do you specialize in any branch of your profession? A. Yes, in orthopedic surgery.

Q. And are you a member of any societies that have to do with your profession?

A. Yes, I am a fellow in the American College of Surgeons and in the American Orthopedic Society, the American Academy of Orthopedic Surgery, in the Western Orthopedic Society, and some others.

(Testimony of Ralph Soto-Hall.)

Q. And what is orthopedic surgery?

A. That is the branch of surgery and of medicine that deals with diseases and injuries of bones and joints.

Q. During the last war, were you in the service, the armed service in that particular branch?

A. Yes, I was the orthopedic consultant for the army overseas in Eastern England, and then I was later orthopedic consultant with headquarters in Chicago, the Central Area.

Q. What was your rank in the army?

A. Lieutenant Colonel.

Q. Now, since your release from the service, you have gone back to your active practice here locally? A. That's right.

Q. And have you another service that you are connected with in [227] reference to the government now?

A. Well, I am just a civilian consultant. I am not in the service. I am civilian consultant to the Surgeon General.

Q. Of the United States Army?

A. That's right.

Q. And you have just returned from a tour of hospitals in Europe?

A. Yes, I went on a consulting and lecturing tour for the Government in occupied zones of Austria and Germany.

Q. Are you connected with any medical schools now?

A. Yes, I am assistant professor at the Univer-

(Testimony of Ralph Soto-Hall.)

sity of California Medical School in the orthopedic department.

Q. Now, Doctor, have you had occasion within the last few days to examine the plaintiff here, George Howard Graham, in your office?

A. Yes.

Q. Would you give us the result of your examination, what you did, what you found?

A. Well, we took the usual history and carried out an orthopedic examination of his back and reviewed some X-rays that had been taken soon after injury. We found Mr. Graham to be suffering from a degenerative intervertebral disc, the last lumbar disc, and he complained of backache. The examination showed that the disc was a lesion of very long standing, and in the X-rays—perhaps I could show the X-rays. It might be [228] easier to describe what I found.

Q. Yes, we have four in evidence and I will put them at your service in chronological order. You can use them as you please. There were two that were taken by Dr. Williams in San Francisco. The date appears to be September, 1946, as printed here. There was one in August, 1948, and then there was one taken at Boulder City February 13, 1946. The one you have in your hand is taken, was taken a little over a month after the accident, August 16, 1945, at Santa Fe Hospital in Los Angeles. Now, with those could you guide the jury in your explanation of what you found in Mr. Graham's back?

A. These were the films that I had an opportunity to study at the time I examined the patient.

(Testimony of Ralph Soto-Hall.)

And they clearly show the pathology here, the changes, the abnormality in the last inter-vertebral disc. This is the fourth, or the second to the last, lumbar vertebra, and here is the fifth or the last lumbar vertebra, and you will see that between these two is a space which is dark, which is occupied by this disc, which is a cushion between the two vertebrae.

These discs have no blood supply and they tend to degenerate rather easily. They are one of the many causes of backache. And in the second one here, you see that this space has disappeared and you also see opposite the previous space in the vertebra in the adjacent surfaces of the intervertebral bodies, you see a whiteness which is new bone formation; that [229] is, a bone that the individual was not born with, but which developed over a period of years. It is a response of bone to irritation, to chronic irritation.

Then in front here, you see this bone formation. Those are projections of bone to try to start nature's effort to splint and stop the motion in that area. This calcium that is visible here is not associated with the spine, that is hardening of the arteries of the abdominal—the abdominal arteries. It is not in the spine itself.

Our examination showed that he had some discomfort at this site, and it was our interpretation that this man has had a degenerative disc over many years. This could not occur, certainly, in less than three or four years, and probably very much longer

(Testimony of Ralph Soto-Hall.)

than that; and that was probably the cause of his symptoms.

Q. Now, do the other X-rays—do you want to use them at all, or——

A. I think these could be shown.

Q. The date on that one, Doctor, is——

A. February 13, '46. These are taken with a little different intensity. Films that come from different laboratories are like photographs that come from different cameras and different people. Some show different shadows and different intensity but the actual outline remains the same, of course. Here again, you see the narrowing here, the upper disc is not as easily [230] visible, but you can see the separation between them in the normal disc, and here you have the narrowed disc with the bony response to the irritation, to the chronic irritation, and the narrowed space.

Q. Does that one have the date?

A. This one is August 16, 1948. These are technically better films. Again you see the normal disc above and below you see the narrowed disc, the bony reaction at the edges of the vertebrae, and the white area due to sclerosis or hardening of the bone from chronic irritation of the vertebral body against the upper part of the sacrum.

Q. Now, Doctor, that calcification, how does that come about?

A. Well, it actually isn't calcification, it is a deposit of bone. It is very much similar to a callous in your hands. You see a thickening of your skin

(Testimony of Ralph Soto-Hall.)

from a callous forming. Well, that is a comparable phenomenon in the spine. You might call it a callous formation from the chronic irritation between two vertebral bodies.

Q. What is your opinion as to the time of the origin of that growth?

A. I don't—that isn't actually a growth. You mean of the——

Q. The degeneration.

A. Oh, the degeneration of the disc. The minimum, I would say, would be three or four years, and the more likely thing is a question of some 15 years or so. We see them quite often in [231] individuals who have had injuries in their teens or in their twenties. They will have a fall, and then over a period of years you see the development of this narrowing and this sclerosis.

A fellow orthopedic surgeon has a very good case, in that he had his wife fall off a horse in her twenties, and he has been able to follow her. Now she is about 48, and it is a beautiful case, and it demonstrates the narrowing of the disc occurring over a number of years and being intershaded by the fall in the twenties.

Q. For the benefit of those X-rays before you, would it or would it not have been possible that the process of injury to that disc occurred as far back as 1914?

A. The man is now, I think he gave me——

Q. I think he gave you the age as 51.

A. 51, yes. He is biologically a little older.

(Testimony of Ralph Soto-Hall.)

Mr. Emmons: I will submit, Your Honor, that that should be stricken on the ground it is not responsive.

Mr. Baraty: I think that is the opinion of a medical man; it is of value.

Mr. Emmons: It is not responsive to the question.

The Court: Well, it might not be. What is your question—how old did he tell you he was?

Mr. Baraty: No, I didn't ask the doctor that question, but he gave me an idea and I will ask him that question and [232] find out.

The Court: Well, ask one thing at a time and let's find out.

Q. He told you that his age was 51, is that right? A. Yes, sir.

The Court: Now, go ahead.

Q. (Mr. Baraty): Biologically, what is your opinion of his age?

A. We don't know the chronological age of people, we only go by the biological age of people; that is, as old as their tissues are. I would say he is considerably older biologically. I don't know what his chronological age is.

Q. Now, Doctor, do those X-rays show any protrusion of the disc?

A. Well, these types of film would not show protrusion.

Q. They would not?

A. They can't show protrusion. You would have to have a myelogram to do that. But clinically,

(Testimony of Ralph Soto-Hall.)

you can determine that almost as effectively as any other way.

Q. Did you find any signs of protrusion on examining him?

A. No, the usual signs of protrusion which we have—four or five of them are pretty accurate. We had absolutely none of them positive. They are all negative. He had no neurological changes. The reflexes were equal and normal. There were no sensory changes. [233]

Q. Could this degeneration have started in 1914?

Mr. Emmons: I submit that has been asked and answered.

Mr. Baraty: I don't think he answered it. That is one of the questions he didn't answer.

The Court: Very well.

A. Yes, it could have started that early and he could have started even without trauma. A certain number of them just degenerate without injury in their middle life. That is in the thirties.

Q. Could it start from a physical encounter, a first fight or something like that?

A. Oh, I don't know; it all depends on how badly you get beaten up.

Q. But it is your opinion that what you see now, and from your examination of this condition, that it existed long prior to——

Mr. Emmons: I submit that has been asked and answered, Your Honor.

Q. ——prior to July 6, 1945?

A. There is no question that the degenerative

(Testimony of Ralph Soto-Hall.)

disc pre-existed that date, '45. That is a condition of very long standing. There is no question about it.

Mr. Baraty: I think that is all.

Cross-Examination

By Mr. Emmons:

Q. Doctor, is it usual practice in San Francisco for an orthopedic surgeon to operate on injuries of [234] this particular type?

A. You mean on degenerative discs?

Q. Yes.

A. Yes, we do quite a number of them. I would say that the way we would do them in San Francisco and at the University, and I think the University of California has been a leader in the demonstration of the pathology of this condition—if there is a protrusion, which often there isn't, but if there is a protrusion, a neurosurgeon operates with us and does the nerve part, and we do the bone part. I would say we have operated on a dozen in the last few months, which is a fairly good percentage.

Q. I see. How many of these cases have you treated?

A. Discs?

Q. Yes.

A. Well, I would say I saw just in the neurological center that I just lectured in in Germany, I must have seen several hundreds. I would say—Just a moment. You asked me the question so I am going to give you just one year. I see never less than several hundred a year.

Q. I see. How many have you operated?

(Testimony of Ralph Soto-Hall.)

A. How many have I operated in the last year? I would say maybe 15 or 20. And in my office maybe 35 or 40.

Q. You have performed the operation yourself?

A. Yes, we fuse our discs when they are that bad. Now, if it [235] is our feeling that degenerative discs—now your word, answering the degenerative discs now—it is our feeling that the degenerative discs, about 90 per cent or more, respond to conservative treatment. So out of a hundred, there will be perhaps ten that are eligible for operation, of which some will not be operable and some will. [235-A] So that out of the hundred cases, there will be eligible for surgery perhaps five or six. I am giving you my impression, not actual statistics.

Q. Yes. Now you have mentioned a neurologist; isn't it a fact that in these operations a neurologist does the operation?

A. No, not a neurologist. They don't operate.

Q. Who does the operation?

A. The orthopedic surgeon and the neurosurgeon.

Q. Well, does the neurosurgeon operate?

A. Yes, he operates.

Q. What performance does he do in such an operation?

A. Well, we do two things; we open it, and then sometimes we operate it and sometimes they operate it. When the exploration has reached the nerve part, the neurosurgeon does the neurological

(Testimony of Ralph Soto-Hall.)

side of the operation, and then we do the orthopedic side of the operation. We almost always work together.

Q. I see. But generally speaking, doesn't the orthopedist usually just diagnose the case?

A. Certainly not.

Q. I see. That is not the practice, then?

A. It is certainly not.

Q. Now in these X-rays that you have examined here, doctor, there is no question that there is a disc there, is there?

A. I wish you would be more specific, because the disk is——

Q. Well, there is no question that there is a degenerative [236] disk? A. That's right.

Q. And you say it is of long standing?

A. That's right.

Q. And you say it could be of the duration of three to twenty years prior to July 6?

A. Or even more. We can't determine after the reaction has reached that stage, how long it is, except that it cannot occur within a period of a number of years.

Q. You examined this man on what date, doctor? A. August 14.

Q. And how long was he in your office?

A. Well, I couldn't tell you. He had a complete examination and we took a history. I really couldn't tell you. I see maybe thirty-five operations a day, and I really don't know how long. All that I can answer is that it was long enough to have all the necessary data obtained.

(Testimony of Ralph Soto-Hall.)

Q. Did he give you a history of the trauma in question? A. That's right.

Q. And the fact that he was in a caboose when it was struck by two switch engines?

A. That's right.

Q. And as a result, he fell approximately six feet to the small of his back, and then when he got to his feet, he was knocked to the floor again by the action of the engine [237] reversing its direction, and the caboose dropping to the track?

A. That's right.

Q. That is the history that you have?

A. That's right.

Q. And from your examination of the X-rays, you stated that there has been a development for a long period of this disk. Now isn't it a medical certainty that as the result of trauma, that pre-existing disability which you have mentioned is exacerbated or flared up a sudden trauma?

A. That can happen, yes, sir.

Q. Well, isn't it a fact, doctor, that that happened in this case?

A. Well, he may have had exacerbation. The question is that I am willing to grant that this man had an exacerbation, probably as a result of his injury, but——

Q. Let me ask you this:——

A. All right, may I finish?

Q. Oh, yes, I am sorry, doctor.

A. (Continuing): I don't want to confuse the issue. The man had, in my opinion, some back

(Testimony of Ralph Soto-Hall.)

pain, and probably had this disk over a number of years. That is my personal impression of the case.

Q. All right. But notwithstanding this——

A. That's right. [238]

Q. ——this injury or this accident, or rather, this injury or this accident exacerbated and caused it to flare up and become a disabled condition?

A. It is possible, yes.

Q. Yes. Now it is also possible, isn't it, doctor, that prior to the time of the accident, this was a non-disabling condition?

A. Well, I couldn't tell you as to the disability, because I didn't examine him there. It could be disabling, or it could not be. I could say that it could be or he could not be disabled. He could have pain, and perhaps he could work or not. I couldn't tell you.

Q. Well take, for example, assuming that this man has been a railroad man in the type of work he told you he was doing, and that he worked steadily for a number of years prior to the time of this accident, and then after the accident, he was disabled. Would you say that his pre-existing condition was disabling or non-disabling?

A. If he had been working continuously, obviously it was not disabling.

Q. Very well. Now did you examine the X-rays which were taken by the Santa Fe Hospital?

A. Yes.

Q. Of this man, in August of 1945?

A. Yes, they are here. [239]

(Testimony of Ralph Soto-Hall.)

Q. I see. Will you put them on the stand, there?

A. (The witness inserted X-ray in shadow box.)

Q. Does that X-ray there, doctor, which is the one taken by the Santa Fe Hospital doctors in 1946, August of 1946, show the same degenerative disk?

Mr. Smith: I think it was '45.

Mr. Emmons: Yes, '45, I beg your pardon.

A. Yes, I have described that that shows the degenerative disk.

Q. (By Mr. Emmons): Yes. Now, doctor, could anyone or any doctor practicing in this state, in looking over that or examining that particular X-ray, miss or omit seeing that disk?

Mr. Baraty: Now, that is the same question we had yesterday, calling for the doctor's—

Mr. Emmons: This is cross-examination, if your Honor please.

Mr. Baraty: Well, it is argumentative, and it is attempting to invade the province of the jury. It is not for this doctor to decide for some other doctor.

The Court: Well, I suppose a doctor could miss it if he didn't look at it or didn't have good eyesight. It is a purely argumentative question. If it is there, it is there. It doesn't make any difference whether anybody else saw it or not.

Q. (By Mr. Emmons): Well, now, doctor, you rendered an opinion, [240] according to that X-ray, haven't you? In other words, you say that by reason of that X-ray, you can see that that man has a degenerative disk?

(Testimony of Ralph Soto-Hall.)

A. That's right; yes, sir.

Q. Now is that a matter that doctors could honestly and reasonably differ in regard to their opinion?

A. I don't follow you. You mean that if two of us saw that X-ray sitting at the same time and one would say that there was no degenerative disk here?

Q. Yes, is it possible for men trained as you are to see those things?

A. Well, not everybody is equally trained, as you know. In a city like San Francisco, there may be fifteen or seventeen who are Board Members, you see, and there may be a thousand doctors. So I couldn't tell you what the training of another man would be.

Q. Well, go to Los Angeles; aren't there many trained specialists down there?

A. Yes, that's right, there are about seventeen members of the Board.

Q. Don't you suppose, or do you know, whether or not there were adequately trained men in the Santa Fe Hospital in Los Angeles?

A. I don't like to answer that.

Mr. Baraty: I feel that this is objectionable, your Honor. [241]

The Court: Yes, I will sustain the objection. We have got enough to do to decide this case, without finding out who the best doctors are in Los Angeles.

Mr. Emmons: All right, your Honor.

(Testimony of Ralph Soto-Hall.)

Q. (By Mr. Emmons): Now, doctor, would this subsequent disability as a result of this trauma cause permanent injury?

A. Oh, he has a permanent condition.

Q. It is permanent?

A. He has a permanent condition of long standing. The degenerative disk is not going to be built up over night. That has been present there, and you just—the only thing—if he were a younger man, you could perhaps do something for him. But naturally, in an older individual, they often settle down, they have some back pain, but they are able to carry on the type of work which they are doing, which their age allows them to do.

Q. Now, in your opinion, would this man be able to do manual labor?

A. Oh, I don't think he is suitable in any way for heavy manual labor now.

Q. You do not think so?

A. I don't think so.

Q. Does he have a definite limitation of motion in his back? A. Yes.

Q. In that particular region? [242]

A. Throughout the back.

Q. Yes. Does that have a tendency to increase as time goes on?

A. Many of these things do, yes, with age.

Q. Now, what treatment should he obtain to gain relief?

A. Well, I think with his age and other than wearing a support and modifying his type of labor,

(Testimony of Ralph Soto-Hall.)

which so many people do as they get to his age, I think that is the best treatment for him. He has no evidence of a protrusion whatsoever, no clinical evidence of protrusion, which would make his case a surgical one.

Q. Now is that a matter upon which reasonable doctors could differ in regard to their opinion?

Mr. Baraty: Same objection.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Emmons): Now, would you say that what he should have is a back brace of some kind?

A. A belt.

Q. A belt? A. Yes.

Q. Now, when the two vertebrae and the disks degenerate, the two bones come together, don't they, and if they are worn completely across, then they grind each other, is that correct?

A. Well, not exactly, but perhaps.

Q. Well, as an illustration, I mean, that is what takes place? [243]

A. Well, the disks are very much like the old sacks that we used to put—not we, but that they used to put when the ferry boats landed. That is, that is their function, to protect.

Q. A cushion, is that it?

A. To protect two hard surfaces from coming against each other, and when they degenerate, as they do here, then the hard surfaces touch each other and they produce this bone reaction.

Q. And doesn't that cause an impingement of the nerve?

A. Not necessarily, no.

(Testimony of Ralph Soto-Hall.)

Q. Not necessarily. But aren't the symptoms which Mr. Graham has indicative of an impingement of the sciatic nerve? A. No.

Q. You think not?

A. No, definitely not. He has no—you see there actually isn't any sciatic nerve involved ever in a disk, but the root, and there is no evidence of any of the roots being involved. You have anesthesia, parathesia or reflex changes, atrophy; those things are absent in the case. We can only go by physical findings, which we find in these cases.

Q. Now, as a matter of fact, you can't tell that from a clinical observation, can you? You have to take a myelogram, isn't that right?

A. No, we go as much on clinical examination as a myelogram, although a myelogram is helpful. A myelogram may be used in case of doubt.

Q. You never operate until you take a myelogram?

A. Oh, yes, modern neurosurgery today is done just as much with as without a myelogram.

Q. Just for the purpose of explanation to the jury, would you explain what a myelogram is?

A. Yes. A radio opaque substance is injected into the spinal canal and allowed to circulate back and forth, and if there is a block, there is a bulge seen of soft tissue, of transparent tissue, whereas the substance that has been injected shows very white, because it is radio opaque.

Mr. Emmons: I have no further questions, doctor.

(Testimony of Ralph Soto-Hall.)

Redirect Examination

By Mr. Baraty:

Doctor, the fact that Mr. Graham returned to and did work for several months after the injury of July 6, 1945, would that indicate to you that there had been no flare up of this old situation?

A. No, I wouldn't say that entirely. I think there could have been a flare up, as I answered before. But the fact that he returned to work would be helpful in evaluating the amount of severity of the exacerbation or the kicking up.

Mr. Baraty: I think that is all.

Recross-Examination

By Mr. Emmons:

Q. Now, suppose, doctor, he went to the hospital the next month and made the same complaint and continued to make the same complaint that he is making at this date. [245] Would that cause you to change your opinion in that respect?

A. Well, the fact he was able to carry on for several months, if that is true—I don't know it to be true—if a man is able to continue with regular, normal work for several months, I have granted he could have as a result of the accident a flare up. Evaluating the flare up, the amount to me, these factors must be considered: First, we know he must have discomfort before, from an examination of his spinal films. Two, from the fact that he went

back to work, I would say that his flare up wasn't too great; but I have granted that he could have a flare up as a result of the accident.

Mr. Emmons: I think I have no further questions.

Mr. Baraty: That is all.

The Court: That is all, doctor. Thank you.

(Witness excused.) [246]

GEORGE H. GRAHAM,
previously sworn; resumed the stand.

Redirect Examination
(Resumed)

By Mr. Emmons:

Q. Now, Mr. Graham, calling your attention to the caboose and your duties as a flagman, who was responsible for the markers on the caboose?

A. The flagman. I was.

Q. You were responsible for them?

A. I was.

Q. And why are they taken down?

A. Well, when you are off duty, why, when you leave your caboose, you take your markers down.

Q. I see. Now, is there a switch,—just for the purpose of clarification—is there a switch at this point? A. There is a switch there.

Q. There is a switch. Let's see—I will make a little square (marking blackboard) and call that a switch. One other thing. Now, this curve that you were talking about that extends from the main line and leads into this point, this switch, is that a sharp curve or a gradual curve?

A. A long, gradual curve.

(Testimony of George H. Graham.)

Q. A long, gradual curve. Now what happens in the event you fail to take your markers down on a car?

A. Why, they fire you, or give you ten demerits, at the least. [247]

Q. I see. Now, do you have any recollection of working on September 31, 1946?

A. I don't.

Q. And what makes you feel that you didn't work on that date?

A. Oh, I don't believe I went to work until after I saw the claim agent and got a release from him, to my best recollection.

Q. Now, this money that you received from the Santa Fe Railroad, did you have a sufficient amount of money or credit to pay that money back to the Santa Fe Railroad?

A. I believe I could have gotten it together at the time, if it had been demanded of me.

Q. Did you have any agreement with your lawyers in regard to paying that man?

A. Yes—well, yes.

Q. What was the agreement?

A. In the event I couldn't get it all together, they would help me out on it.

Q. I see. So that at all times, if necessary, you could have obtained \$1050 to repay the Santa Fe Railroad? A. I believe I could have.

Mr. Baraty: That is leading and suggestive, your Honor. I object to it on that ground.

The Court: I will sustain the objection.

(Testimony of George H. Graham.)

Mr. Baraty: May the answer go out?

The Court: The answer may go out. [248]

Q. (By Mr. Emmons): Well, what was the agreement, Mr. Graham?

The Court: He has already answered. He said the lawyers would help him out if he couldn't get the money.

Q. (By Mr. Emmons): At the time that you executed this release, did you have some property up there in Searchlight? A. I did.

Q. Did you own that property? A. I did.

Q. Do you still own it?

A. I still own it?

Q. Did you own it on the date that you rescinded this release? A. Yes.

Q. Now, is that property now, or was it then, worth \$1,000 or more? A. Oh, yes.

Q. And could you have obtained more than \$1,000 for it?

A. I could have gotten that without much trouble.

Q. And could you have borrowed \$1,000?

A. Oh, yes.

Q. Your wages, Mr. Graham—the railroad here has designated in 1944, the highest month, to be \$515 or \$513 I guess; is that about right?

A. Well, along in there. I have made that much.

Q. And the average for that particular year was somewhere around \$312.71. Is that approximately right? [249] A. That is possible.

Q. When you left Searchlight—I mean, Needles

(Testimony of George H. Graham.)

—to go to Searchlight on the morning of the accident in your automobile, you testified, I believe, that you didn't have any trouble. What was it that you didn't have any trouble with?

A. I didn't have any car trouble.

Q. Did you have any trouble with your back?

A. Oh, yes, I was in bad shape.

Q. Did it pain you on the trip home?

A. Oh, yes.

Q. Were you able to drive your car after that for a while?

A. Well, I didn't drive for several days, I don't believe. My wife handled the car.

Q. Now, how did you get along, Mr. Graham, not working?

A. Well, I had a little money.

Q. You had a little money yourself?

A. Yes.

Q. And was your wife working?

A. She was the postmistress there.

Q. She was the postmistress where?

A. At Searchlight.

Q. At Searchlight. Does it take a lot of money for you to live up there?

A. No, not so much.

Q. I see. Now, the question of your age has come up, Mr. Graham. [250] Did you enter the service of any railroad at any time prior to your twenty-first birthday?

A. What birthday?

Q. Twenty-first. A. No.

Q. Isn't there a company rule, or is there a

(Testimony of George H. Graham.)

company rule, that forbids the hiring of minors?

A. That's right.

Mr. Baraty: What company rule? I will object to it as being indefinite.

Mr. Emmons: May I have your Rule Book, counsel?

The Court: Well, we are getting into extraneous matters. This didn't happen?

Mr. Emmons: Well, the thing is, your Honor——

The Court: When this man was twenty-one years of age?

Mr. Emmons: Well, in some of these things, I believed, he would be seventy-three years of age at the present time, and he would have been employed at a time when he was about fifteen or sixteen years of age.

The Court: I think you misread the figures.

Mr. Baraty: The earliest date is 1885. That wouldn't be seventy-three.

Mr. Emmons: Well, Rule 302 provides that no minor may be employed. I would like to read it into evidence, if I may.

Mr. Smith: I think the record will show that one the [251] Santa Fe, he showed he was twenty-five years old when he first went to work.

The Court: Well, we are wasting too much time on immaterial matters. Is it agreed that the railroad doesn't hire people under twenty-one? Any question about that?

Mr. Baraty: Well, he can read the rule. We don't know about it.

(Testimony of George H. Graham.)

The Court: Well, it takes too much time to go into these immaterial matters. I will tell the jury that for all practical purposes, they may consider that people under twenty-one are not hired by the railroads; although I don't see the materiality.

Mr. Emmons: I will read the last sentence.

The Court: Go ahead and ask some other questions. Don't take up our time with these matters.

Mr. Emmons: I have no further questions.

Recross-Examination

By Mr. Baraty:

Q. Mr. Graham, that property at Searchlight, when did you acquire it and what did it cost?

A. Forty-three and four.

Q. Forty-three and four?

A. And forty-four.

Q. What did it cost? A. How's that?

Q. What did it cost? [252]

A. Oh, I paid the taxes on some of the patent ground and got that, and the unpatented ground, why, relocated it.

The Court: But he wanted to know how much it cost.

The Witness: Oh, I don't know.

Q. (By Mr. Baraty): Well, it is a mining claim?

A. That's right.

Q. Didn't cost you anything but taxes and an assessment or assessments?

A. Well, I hired the assessment work done.

Q. That is all it cost?

A. I guess so, \$100 a piece, the claims.

(Testimony of George H. Graham.)

Q. Is it in your name or in your wife's name?

A. In both our names. She owns so much and I own so much.

Q. Now, did you ever try to borrow any money on it, ever?

A. Well, no, but I can on the Golden Garter.

Q. You what?

A. On that patented claim, the Golden Garter; it is a valuable claim.

Q. You never attempted to borrow any money on it?

A. No, I never have borrowed money.

Q. And at the time of this accident, was the lady you afterwards married, the postmistress there?

A. She was postmistress there.

Q. Is she there now, as postmistress?

A. No, she gave it up. [253]

Q. That doesn't bring very much compensation in, that little place, does it?

A. How's that?

Q. That doesn't bring very much pay in a little place like Searchlight?

A. I don't understand the question.

The Court: He says the postmistress doesn't get very much money in a little place like Searchlight?

The Witness: Oh, about \$90 a month.

The Court: About \$90 a month.

Q. (By Mr. Baraty): Yes. Now, did you have any agreement with the first lawyers you had in this lawsuit to reimburse the Santa Fe for the money——

(Testimony of George H. Graham.)

Mr. Emmons: I will object to that as being incompetent, irrelevant and immaterial, and the matter is one which is privileged between attorney and client.

Mr. Baraty: Well, they brought out that he had an arrangement with his present lawyers. I would like to know if he had an arrangement with his first lawyers.

Mr. Emmons: That is superfluous.

Mr. Baraty: For the reason, your Honor, when reimbursement is attempted, it has got to be made within a reasonable time. If he is contending now that these are the gentlemen who were going to lend him the money, I would like to know if he had an arrangement when he filed a complaint, about a year [254] before they came into the case.

The Court: Well, I think the question is proper, but can't we get this examination closed? We are going over the same ground that has been gone over.

Mr. Baraty: This is something just brought out on redirect.

The Court: Well, he made the same statement in examination, if I remember rightly, that he had some arrangement with the lawyers that they were going to have to help him out.

Mr. Baraty: No, never said anything about that.

The Court: Somebody did.

Mr. Baraty: Somebody was going to help him out; he had some place of getting the money.

Mr. Emmons: That should be sufficient, your Honor; I think that is sufficient.

(Testimony of George H. Graham.)

Mr. Baraty: Well, it was just brought out fifteen minutes ago.

The Court: I will allow the question.

He wants to know whether you had an arrangement with the lawyers that you had when you filed the complaint that they would give you the money.

The Witness: No.

The Court: No.

Mr. Baraty: Now, about the flagman's responsibilities, you were not off duty while you were sitting in the caboose there on Track 20? [255]

Mr. Emmons: That has been asked and answered. A. No, I was not off duty.

Q. And you still had to take that train into the freight yard? A. Not necessarily.

Q. You still had to sign the law sheet that you were through with the work for the day?

A. How's that.

Q. You still had to sign the law suit that you were through with your work for the day?

A. Yes, but I may set out there for two or three hours before they pulled me in.

Q. You were still on duty while you were still in there, weren't you?

A. That's right, up to fifteen hours and thirty minutes.

Mr. Baraty: That is all.

Mr. Emmons: You may step down, that is all.

(Witness excused.)

Mr. Emmons: Mr. Syock.

ARTHUR RALPH SYOCK,

called on behalf of the Plaintiff; sworn.

The Clerk: Will you state your name to the Court and jury?

A. Arthur Ralph Syock. [256]

Q. Arthur Ralph Syock?

A. Yes, 595 Cibola, Needles, California.

Direct Examination

By Mr. Emmons:

Q. Is that C-e-b-o-l-a?

A. C-i-b-o-l-a.

Q. Mr. Syock, what is your occupation?

A. I am a switchman, a switch foreman.

Q. You are a switch foreman?

A. An engine foreman.

Q. Engine foreman. And for whom?

A. The Santa Fe.

Q. Santa Fe Railroad? A. Yes, sir.

Q. And are you presently retired?

A. Yes, sir.

Q. And were you connected with the Santa Fe Railroad on July 6, 1945? A. Yes, sir.

Q. At Needles, California?

A. That is right.

Q. What was your capacity at that time?

A. What was what?

Q. What was your capacity?

A. Switchman, see?

Q. Switchman? [257]

A. You see, switching trains, breaking up and making up trains.

Q. Now, how long have you been in the railroad business? A. Since 1902.

(Testimony of Arthur Ralph Syock.)

Q. Since 1902?

A. In the transportation.

Q. Forty-six years? A. That's right.

Q. And what did you start out as in the railroad business? A. Braking.

Q. Brakeman? A. Yes.

Q. And then did you become an engine foreman?

A. No, became a conductor, and then back to the switching district, and I went switching, engine foreman, yardmaster.

Q. I see. You have been an engine foreman and also a yardmaster? A. Yes, sir.

Q. Where were you an engine foreman?

A. I was an engine foreman on the Kansas City Terminal.

Q. I see.

A. And an engine foreman on the Santa Fe.

Q. At Needles? A. At Needles.

Q. And where were you a yardmaster?

A. At Kansas City Terminal and the Santa Fe, here at Needles. [258]

Q. At Seligman? A. At Seligman.

Q. In Arizona? A. That's right.

Q. Now, on the morning of July 6, 1945, at about 1:30 in the morning, were you in the area of the east end of the icehouse in Needles, in the Needles yard? A. Yes, sir.

Q. And on that morning, what, if anything, occurred there that attracted your attention?

A. Why, an engine had hit the rear end of a train on 20.

Q. An engine? A. Two engines.

(Testimony of Arthur Ralph Syock.)

Q. An engine struck the rear end of a train here; was it a caboose or what (indicating)?

A. It was a caboose.

Q. It was a caboose. Were there many cars in this track in this train? A. In 18?

Q. No, on 20.

A. Oh, on 20, there was a train in there, certainly.

Q. A train in there?

A. A train in there.

Q. Now, where were you standing, approximately?

A. I was standing right at the east end of the icehouse, [259] shoving into 70.

Q. Right about there (indicating)?

A. Right there.

Q. I will make a little "x" there. That would be about here, is that it (indicating)?

A. That's right.

Q. Now, did you see the impact? A. No.

Q. Did you see the—you heard the crash?

A. That's right.

Q. Did you see the engineer reverse his engine and pull away? A. Correct, sir; that's right.

Q. What happened to the caboose when that happened?

A. It fell down on the east end of the caboose, it fell down to the track.

Q. I see, the east end of this caboose fell down right onto the track? A. That's right.

Q. What happened to the trucks or the wheels of the caboose?

(Testimony of Arthur Ralph Syock.)

A. They was knocked off center, you see, they call that, loose underneath there.

Q. And what happened to the caboose in relation to the car next ahead of it?

A. It was shoved up on the freezer right ahead of it, reefer, on a forty-five degree (indicating).

Q. The refrigerator car?

A. Certainly, a refrigerator car.

Q. Now, can you tell me about how many car lengths the caboose would be from the east end of the icehouse, as it is drawn on there (indicating)?

A. Well, it was kind of an angle, southeast of—about three car lengths.

Q. About three car lengths this way from the east end of the icehouse?

A. That's right, that's correct.

Q. Now, can you tell me how many car lengths it would be from—let me ask you this first: Is there a spur track—

The Court: Well, counsel, there doesn't seem to be any dispute about these facts you are going into, as far as I can understand from counsel's statement, and I don't see much point in taking up the time of the Court and jury in going into them. The defense counsel in his statement admitted that the engine ran into these cars.

Mr. Emmons: Well, the admission of the fact of impact wouldn't be sufficient to show the negligence. The negligence comes in what the operators of the train did.

The Court: Yes, that is true.

(Testimony of Arthur Ralph Syock.)

Mr. Emmons: That is what I wish to establish.

The Court: Well, he has already testified that they ran into the caboose, and then backed away, and he has described [261] the position of it. What has the car lengths from the ice house and all that got to do with it?

Mr. Emmons: Well, after all——

The Court: I think we will save more time if you go ahead, but——

Q. (By Mr. Emmons): How many car lengths from the icehouse is it down to that spur track where the outfit cars are?

A. Oh, maybe fifteen to twenty.

Q. Fifteen to twenty cars?

A. Something like that.

Q. What was the condition of the caboose after the impact? A. It was badly damaged.

Q. It was. And what was the condition of this refrigerator?

A. It was badly damaged, they had to unload it.

Q. What was the condition of the front end of the engine?

A. The engine, the pilot was knocked off.

Q. What is the pilot?

A. The cowcatcher.

Q. The cowcatcher. Did you see Mr. Graham on that night? A. Yes, sir.

Q. And where was he when you saw him?

A. He looked like he had been up to the train, walked over, I walked over to him and said, "What is the matter, George, you been hurt?" He mum-

(Testimony of Arthur Ralph Syock.)

bled, king of groggy-like, you know, said "Uh-huh" (negative) just like that, see? [262]

Q. What was his appearance? Did he show any evidence of injury?

A. Why, his face was bleeding on the right side here (indicating), it bled all over his face, and he pulled his head around, I looked at it to see whether he was hurt bad, you know, and he was bleeding, and he kind of staggered away from me, see?

Q. Now, let me ask you this: Were there any lights on in the icehouse?

A. Oh, yes, it was lit up well.

Q. It was in a dark area or in a light area?

A. Oh, just big lights there and lights around there very much when they are on, see.

Q. I see. I take it that you are familiar with the Company Rules, are you? A. Fairly.

Q. And Rule 19-A, as I understand it, is that as long as a train is off the main track, the markers on the end of the caboose may be taken down or must be taken down; is that true?

A. That's right. When they are in, delivered to the yard or in clear of the main line, the markers must be taken down.

Q. I see. Now, in your opinion, and your knowledge of this area in here, if there is a train parked in this area, right along here on Track 20 (indicating), would it be necessary to keep yellow markers up on there? [262]

A. Oh, no, not necessarily. We see the cars in there lots of times. I have.

(Testimony of Arthur Ralph Syock.)

Q. Without yellow markers?

A. Without any markers at all, yes, switching.

Q. Is it necessary that before a man enters the service, that you have to pass an examination in regard to Company Rules? A. Yes, sir.

Q. And are you familiar with Rule 304?

A. Yes, sir.

Q. In regard to the matter of obtaining a release from the company in regard to injuries?

A. Yes, sir.

Q. Is that rule usually included in that examination? A. Yes, sir.

Q. Now you have stated that you have been a yardmaster at Seligman for the Santa Fe Railroad. As a yardmaster——

Mr. Baraty: Did he say yardmaster?

Q. (By Mr. Emmons): Did you say yardmaster?

A. At Seligman, yes, I was a yardmaster.

Q. Did you ever see or hear of an abrogation of Rule 304? A. Yes, sir.

Q. You have? When did this take place?

A. Oh, just——

Q. Now, what I mean by an abrogation, is that it has been rescinded and taken off the books. [264]

A. Oh, no, I have never heard of that.

Q. You have never heard of that? A. No.

Q. In other words, is it your opinion that the rule is still in force and effect today?

Mr. Baraty: Well, we object to that as calling for the opinion and conclusion of the witness; it is

(Testimony of Arthur Ralph Syock.)

not for him to decide whether it is in full force and effect.

The Witness: It is still in the book of rules.

The Court: I will sustain the objection.

Mr. Emmons: Let me ask you this: Is it still in the book of rules?

A. It is still in the book of rules.

Mr. Baraty: We have stipulated to that.

Q. (By Mr. Emmons): Now, Rule 93, as I take it, Mr. Syock, states that an approaching train within yard limits must do two things, it must proceed at a restricted speed, and secondly, being an approaching train, it is responsible for all collisions?

Mr. Baraty: Your Honor, this rule speaks for itself.

A. That's correct.

The Court: Yes, all you are doing is restating the rules to the witness, counsel. They are already in evidence.

Q. (By Mr. Emmons): Now, Mr. Syock, in your opinion as a railroad man, would two engines approaching here striking the [265] rear end of a caboose, would they have violated Rule 93?

Mr. Baraty: Your Honor, that is for the jury to determine.

A. Yes, sir.

Mr. Baraty: I object to that as involving the invasion the province of the jury.

The Court: The answer may go out, the objection is sustained.

(Testimony of Arthur Ralph Syock.)

Q. (By Mr. Emmons): When did you go to work for the Santa Fe?

The Court: What difference does that make, counsel?

Mr. Emmons: Well, in regard to this rule, is all, your Honor—just two questions.

A. Latter part of '44.

Q. In 1944? A. Uh-huh (affirmative).

Q. And you were given a book of rules at that time? A. Yes, sir.

Q. Was Rule 304 in effect then?

A. Yes, sir.

Mr. Emmons: I have no further questions.

Cross-Examination

By Mr. Baraty:

Q. How long have you worked for the Santa Fe?

A. In '44, latter part of '44 until '45.

Q. How long did you work for them?

A. Well, from 1944 until the latter part, about seven months, in there. [266]

Q. And did you retire or quit, or what happened? A. I resigned.

Q. And are you employed as a railroad man now? A. Sir?

Q. Are you employed as a railroad man now by any other company?

A. No, I am retired now.

Q. Have you ever worked for the Southern Pacific? A. Yes, sir.

Q. When was it, when was the last time?

A. It was in December of '45.

(Testimony of Arthur Ralph Syock.)

Q. You got an action pending against the Southern Pacific Railroad now for personal injuries, pending in Chicago, haven't you?

A. That's right, that's correct.

Q. Now, concerning Rule 304, have you ever had any opportunity to consider that rule because of any injuries to yourself?

A. I am a little hard of hearing.

Q. Excuse me. Has that particular rule ever come under your observation personally?

A. No, sir.

Q. And did I understand you to say you were yardmaster or yardman?

A. I was a yardmaster at Seligman and an engine foreman at Needles. [267]

Q. How long at Seligman?

A. I was up there about six months.

Q. And during your employment with the Santa Fe, you were never brought into a discussion personally of Rule 304, as to anything that occurred to you?

A. (Shook head in the negative.)

Q. Now, you didn't see this accident, of course? You did not see the accident?

A. No, I heard it. I was standing with my back turned when they hit, you see.

Q. And did you walk over to the caboose, or did Mr. Graham come over where you were?

A. I walked over to the caboose.

Q. And his face was bleeding?

A. Bleeding on his right side here (indicating).

(Testimony of Arthur Ralph Syock.)

Q. Was he walking around unassisted?

A. Yes, kind of staggering around, you know.

Q. Did you see him leave the place?

A. No, I went over and got and shoved in on 17 then.

Q. And did you——

A. Excuse me, wait a minute.

Q. Excuse me, sir, I am very sorry.

A. And cut my engine over and down through 18.

Q. Did you advise him to go to the hospital for this blood that was on his face?

A. Why, you couldn't talk to him, he was kind of groggy, see. [268]

Q. Did he say whether or not he wanted to go to a hospital?

A. Never said a word. He just mumbled something to me and was standing there, and the engineer and fireman on the other job, you know, had ahold of him there, and I supposed that they was going to take care of him.

Q. And so in his groggy condition, you left him alone anyway?

A. Yes.

Q. On his own?

A. Sir?

Q. On his own, by himself?

A. No, with the engineer and the fireman off of them other two engines that was there.

Q. The men that he was having this argument with?

A. I don't know anything about the argument. Never heard it.

(Testimony of Arthur Ralph Syock.)

Q. You never heard about his argument with the enginemen of these two engines? A. No.

Q. Haven't you been sitting in the courtroom for two days?

A. All I have heard was said here in the courtroom.

Q. You heard it mentioned here?

A. Oh, but down there, I thought you meant down there.

Q. Oh, I see. Now this matter of taking down or leaving up of markers, markers always are helpful, are they not, on the rear end of a standing train?

A. Well, I have seen them taken down there just numerous times, [269] just the same—when-ever they head-in on 20 there, they take them down.

Q. You have seen them up there in 20, haven't you, too? A. Yes; well, it works both ways.

Q. So my question, I am coming back to the question: Aren't markers, displaying markers, helpful at night, always helpful in a situation like existed here?

A. Oh, I wouldn't say so, if a man was watching, you know, looking out for things ahead. You will head through those yards any place in Needles, any place, without markers being up and come again them and stop.

Q. Well, you know that this was on a curve and part of the curve is obscured?

A. It didn't make any difference whether there was train or not—when those markers are taken off, they are not a train.

(Testimony of Arthur Ralph Syock.)

Q. Well, will you say this, that markers are helpful in cases, and in other cases they are not?

A. Well, I don't see where they need them there.

Q. But they do leave them up there on 20?

A. Sometimes, and sometimes they don't.

Mr. Baraty: That is all.

Mr. Emmons: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Emmons: Now, will counsel stipulate that on November 25, [270] of 1946, our office sent a letter to Messrs. Sievert and Ewing, attorneys for the Santa Fe Railroad in Los Angeles?

Mr. Baraty: Let's see the letter. Maybe we can tell (examining). Yes, we will stipulate that that was sent and that we received it.

Mr. Emmons: And I would like to offer in evidence, a letter dated November 25, 1947, directed to Messrs. Sievert and Ewing, Attorneys at Law, 121 East 6th Street, Los Angeles, and may it be admitted in evidence, your Honor?

The Court: All right.

The Clerk: Plaintiff's No. 5.

(Letter dated 11/25/47 referred to above was received in evidence as Plaintiff's Exhibit No. 5.)

Mr. Baraty: We received that letter in our office in San Francisco. We admit the receipt of it.

Mr. Emmons: I would like to read this to the jury (reading).

“November 25, 1947.

“Messrs. Sievert and Ewing,
Attorneys at Law
121 East 6th Street,
Los Angeles, California.

Re: Graham vs. Santa Fe Railroad
Gentlemen: [271]

“Enclosed please find file-marked copy of Substitution of Attorneys in the captioned case, wherein this office replaces Emmett R. Burns, Esq., as attorney of record.

“Also enclosed, please find a Notice of Rescission of Release and Offer to Restore Consideration executed by Mr. Graham. Kindly advise us of your wishes in this respect.

“Very truly yours,

PHILANDER BROOKS BEADLE,
By “.....”

This letter, I wrote myself, personally.

Mr. Emmons: Now, I would like to read from 41 Corpus Juris, Page 216, American Experience Tables of Mortality: The life expectancy of Mr. Graham. For the age 49, it is indicated as 21.63.

Mr. Baraty: Well, we will object to that.

The Court: You mean that a person forty-nine years of age, according to the table, has a life expectancy of 21.63?

Mr. Emmons: Yes, 21.63.

Mr. Baraty: Well, I think if that is going to be considered, the various other ages that are before the Court should now likewise be read.

The Court: Well, you can offer that.

Mr. Baraty: Well, we might as well have it all at once. [272]

Mr. Emmons: There are no other ages in evidence, your Honor.

Mr. Baraty: Oh, yes, we have; that has been accepted.

The Court: Any other evidence of the plaintiff?

Mr. Emmons: No, your Honor.

The Court: The plaintiff rests?

Mr. Emmons: Yes, your Honor.

(The plaintiff rested.)

The Court: Any motions?

Mr. Baraty: We would like to direct a legal matter to your Honor's attention, if you can bear with us a little while.

The Court: The jury may take a recess a little earlier today. Please bear in mind the admonition of the Court.

(Jurors retired from the courtroom, and the following occurred outside the presence of the jury.)

Mr. Baraty: Your Honor, the defendant now moves for a judgment of dismissal in its favor on the grounds that there is no sufficient evidence before the Court——

The Court: You want a directed verdict?

Mr. Baraty: A directed verdict, yes. There is no sufficient evidence now before the Court to overcome a validity of this release, which there is no evidence to show was obtained by fraud, by duress, by undue influence. It is a release in full for all known and unknown injuries.

(Whereupon counsel for the respective parties argued the [273] motion.)

The Court: Any further argument in this matter? Anything further that you wish to say, Mr. Emmons?

Mr. Emmons: No, your Honor.

The Court: We will take a five-minute recess, and then return the jury.

(Short recess, following which the jury resumed its position in the jury box, and the following occurred in the presence of the jury.)

The Court: The defendant in this case has moved the Court to direct a verdict in favor of the defendant. The grounds of the motion are that no issue of fact with respect to the second and separate defense raised by the answer requires a decision by the jury. The second separate defense raised by the answer is that the plaintiff and defendant, on the 1st day of October, 1945, entered into a mutual agreement by which all claims arising out of this accident on the part of the plaintiff were released and discharged upon the payment to and receipt by the plaintiff of a sum of \$1,050.

In the opinion of the Court, the evidence presented on behalf of the plaintiff, who has submitted his cause, raised no question of fact that requires resolution by the jury. On the contrary, it is my opinion that the evidence discloses that no circumstances presented by the evidence and recognized by the law requires any change or rescission of the agreement that the [274] parties entered into on the 1st day of October, 1945.

The evidence shows that this agreement was entered into under no compulsion, for a fair consideration, and that both parties had in mind the consideration as that related to the purposes and objects of the agreement.

Furthermore, no timely rescission or attempted rescission of this agreement is shown by the evidence. The evidence does not disclose any factual matter with respect to any mistake or fraud or undue influence in connection with the execution of this agreement.

Consequently, there is nothing for the jury to pass upon. The Court finds that there are no circumstances of any kind disclosed by the evidence to justify the rescission of this settlement, which appears to have been a fair and equitable one, and not made under mutual mistake of any kind at the time, or induced by any fraud or undue influence.

For the reasons that I have stated, the motion for a directed verdict will be granted.

This will require me, ladies and gentlemen, to appoint a foreman of the jury for the purpose of filing a formal verdict. The Court will appoint Mr. Turner, Number 1 juror, as the foreman, and I will ask the juror to sign the form of directed verdict.

I do this, ladies and gentlemen, because, while the decision which the Court has made takes the case out of the hands of the [275] jury and is really the decision of the Court, there are some holdings by our higher court to the effect that there

should be a formality of filing a verdict. I am not in agreement, myself, with that holding of the higher court, because I consider that it is folderol to require that; but I nevertheless feel that as a lower court judge, I must resolve that doubt in favor of those who rule higher up.

(Form of directed verdict was handed to Mr. Turner, who signed the same.)

The Court: That is why I have appointed a foreman and required the foreman to sign the verdict.

The Court has decided this case as a matter of law, and thus there is nothing further for the jury to do in the case.

Now, let me say to you that you shouldn't feel chagrined or disturbed because you haven't had an opportunity to pass upon the case. You have performed just as valuable service by being here in the event that the decision should be required as if you had yourself decided the case.

But at any rate, there is nothing you can do about it now, because the Court has decided the case. The members of the jury may be excused until you are notified to attend.

(Whereupon, at 3:54 o'clock p.m., the jury was excused and left the court room.)

The Court: The clerk is directed to file the verdict signed by the jury in the records of the case. [276]

CERTIFICATE OF REPORTER

I, Eldon W. Rich, Official Reporter, pro tem, certify that the foregoing 277 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to type-writing to the best of my ability.

[Endorsed]: Filed Oct. 29, 1948. [277]

[Endorsed]: No. 12099. United States Court of Appeals for the Ninth Circuit. George H. Graham, Appellant, vs. Atchison, Topeka and Santa Fe Railway Company, a Corporation, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 24, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12099

GEORGE H. GRAHAM,

Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILROAD, a Corporation,

Appellee.

DESIGNATION OF POINTS ON WHICH AP-
PELLANT WILL RELY ON APPEAL
HEREIN

On appeal to the United States Court of Appeals for the Ninth Circuit, the appellant herein will rely upon the following points:

I.

The uncontradicted evidence adduced at the trial established

[a] Appellee's liability as a matter of law, and

[b] That the release pleaded in appellee's answer is invalid as a matter of law.

II.

The District Court erred in directing a verdict in favor of appellee.

III.

The District Court erred in holding that the release signed by appellant was, as a matter of law, a bar to this action. Even if appellant's point I,

supra, were not well taken, the evidence a least presented the following questions of fact, which should properly have been submitted to the jury:

1. Whether the acts of the appellee in dealing with appellant constituted fraud;
2. Whether there was a mutual mistake of a material fact at the time of execution of the release;
3. The nature, extent, exacerbation and permanency of appellant's alleged injury;
4. Whether appellant knew or suspected the nature, extent, exacerbation or permanency of his alleged injury; and
5. Whether appellant had effectively rescinded the release.

IV.

The District Court erred in refusing to permit counsel for appellant on direct examination to put to appellant the question whether appellant "knew or suspected" that he had suffered a permanent spinal injury at the time he signed said release.

Dated: December 16, 1948.

/s/ PHILANDER BROOKS

BEADLE,

/s/ ERNEST E. EMMONS, JR.

Attorneys for Appellant.

[Endorsed]: Filed December 16, 1948. Paul P. O'Brien, Clerk.



No. 12,099

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE H. GRAHAM,

Appellant,

VS.

THE ATCHISON, TOPEKA & SANTA FE
RAILROAD (a corporation),

Appellee.

BRIEF FOR APPELLANT.

PHILANDER BROOKS BEADLE,

ERNEST E. EMMONS, JR.,

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FILED

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No. 12,099

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GEORGE H. GRAHAM,

Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILROAD (a corporation),

Appellee.

BRIEF FOR APPELLANT.

I. NATURE AND JURISDICTION OF APPEAL.

This is an action arising under the Federal Employers' Liability Act (Title 45 § 51 U.S.C.A.) for damages for personal injuries alleged to have been sustained by appellant while performing his duties as a brakeman in the employ of defendant railroad. Plaintiff is a citizen of the State of California. Defendant corporation is a citizen of the State of Kansas. Plaintiff has appealed from a directed verdict and the District Court's order denying appellant's motion for new trial. The jurisdiction of the Circuit Court to hear this appeal rests upon 28 U.S.C. 225 and 230. The case was tried in the District Court,

Judge Louis E. Goodman sitting with a jury, on August 17, 18 and 19, 1948. The Court instructed the jury to return a verdict in favor of the defendant Santa Fe Railroad. The jury did so. On August 21, 1948, judgment on the directed verdict was entered of record in favor of defendant Santa Fe Railroad. A motion for new trial was filed on August 25, 1948. That motion was denied on September 20, 1948.

The filing of the motion for new trial suspended the running of the time to appeal from the judgment until its determination. (*Reliance v. Burgess*, 112 F. (2d) 234, 240; Rule 73(a) FRCP, as amended.)

Appellant's notice of appeal was filed on October 16, 1948. The transcript was filed on October 29, 1948.

II. QUESTIONS PRESENTED.

A. Where the evidence in an action under the Federal Employers' Liability Act is such that the only inferences which can properly be drawn therefrom require a verdict in favor of the injured employee, should the Appellate Court direct the trial Court to retry the entire case or to merely submit to the jury the issue of the extent of plaintiff's damage?

B. Was the District Court entitled to hold, as a matter of law, that a general release constituted a complete defense to an action for personal injury

under the Federal Employers' Liability Act, where there is substantial evidence to support inferences of:

1. Fraud in obtaining the release;
 2. Mutual mistake of fact; and
 3. Plaintiff's lack of knowledge, when he executed the release, of the true nature, extent and permanency of his injury?
-

III. STATEMENT OF FACTS.

The facts are uncontradicted. Defendant rested its case after producing only the medical testimony of one witness (221)¹ and moved for a directed verdict (263).

The evidence shows that plaintiff started to work for defendant in 1943 (70). At the time of the accident he was employed as a brakeman and defendant was engaged in interstate commerce (26). Plaintiff was under no physical disability and was able to perform the duties of his work (86-87).

On July 5, 1945 plaintiff was working as a flagman (brakeman) (26; 86). He started to work at 11 a.m. at Seligman, Nevada, on a freight train en route to Needles, California (26). The train arrived in the Needles freight yard at 1 a.m. on July 6, 1945, and stopped on track 20 clear of the main line (28). Plaintiff's duty was to stay with the caboose (30).

¹Unidentified arabic numerals in parenthesis refer to the pages of the record.

Having cleared the main line (28), plaintiff took down the yellow markers (lanterns) from the rear end of the caboose (30-32) pursuant to company rule No. 19A (31). He then crawled up into the cupola of the caboose, which had observation windows, and sat down while waiting for his train to move further on into the freight yard (32-33). While sitting there, he noticed the reflection of the headlight of an approaching train about 1000 feet to the rear. He turned and watched it and saw it was coming fast. He then leaned out of the cupola window and signaled it to stop with his lantern, but got no response (34-35). Plaintiff then got down from the cupola and went to the rear platform and signaled again. He saw that he had no time to break a fussee as the approaching train was too close.

On one side of the caboose was a river, and on the other side piles of ties. Plaintiff therefore decided to return to the cupola (35). While getting back to his position in the cupola an impact occurred and plaintiff was pitched into the air and down upon the floor of the caboose, approximately six feet below (36), falling upon his back, hips, head and left shoulder (37). Plaintiff was in the act of getting to his feet when a second impact occurred as the engineer of the other train reversed his engine and jerked away from the caboose, thereby causing its rear end to fall to the tracks (37-38). As a result, plaintiff was again thrown to the floor on his back (38).

The first impact pushed the caboose up and into a refrigerator car of bananas (39). The second impact caused the floor of the caboose to fall to the tracks, so that plaintiff fell and was caused to slide out the rear door of the caboose (39).

Plaintiff crawled into a passenger train and was taken into the station. Someone drove him to his cottage in Needles (42). He then painfully drove his car to his home at Searchlight, Nevada (110; 243).

About three weeks later plaintiff was driven to Needles to see a company doctor, who gave him pills to relieve his pain (44).

In early August, plaintiff returned to Needles and saw Dr. Holz, another company doctor, who told him to enter the Santa Fe Hospital at Los Angeles. At that time, plaintiff was suffering pain, mostly in his hip, back, left shoulder and head (45).

On August 10, 1945 plaintiff went to Los Angeles and on August 14, 1945 was admitted to the Santa Fe Hospital (46). X-rays were taken of his injuries and he left the hospital on August 24, 1945 (46). These x-rays revealed plaintiff to have a crushed intervertebral disc between the 5th lumbar and sacrum (223-225; 233-234).

Plaintiff did not see those x-rays and did not know what they revealed (49).

While in the hospital plaintiff was approached by a Mr. Sims of the defendant's claim department in Los Angeles regarding settlement of his case (132).

Upon leaving the hospital, plaintiff refused to settle with the defendant (131-132).

On September 19, 1945, plaintiff discussed his condition with Dr. C. A. Morrison, chief surgeon of the Santa Fe Hospital. Dr. Morrison told him to "go back to work on a passenger job, take it easy and you'll be all right within 30-60 days", and released him (47). The release was unqualified (Pl. Ex. No. 1). At this time, plaintiff did not know he had injuries other than those discussed with Dr. Morrison (49-50).

Plaintiff returned to Needles and discussed settlement with a Mr. Lewis of defendant's claim department. He was told to go to the Los Angeles claim office for this purpose (132). He did so and on October 1, 1945, signed a release (Def. Ex. G) and received a check (Def. Ex. H) in the amount of \$1,050. At the time of signing this release, plaintiff did not know he had suffered a permanent disability (57; 61-62).

Plaintiff attempted to return to work as advised by Dr. Morrison. He worked for a period of 45 days with difficulty and pain and was unable to do his regular work (59). Subsequently, he was discharged by defendant (63). He was unable to work thereafter, not being able to work a full day (63).

On February 13, 1946 plaintiff's spine was x-rayed by Dr. Fenlon (59). These x-rays showed the same injury revealed in the x-rays taken at the Santa Fe Hospital in August of 1945 (170; 233-235). Dr. Fen-

lon advised him that he had an injury to his spine (61). This was the first plaintiff knew of this spinal injury. He did not know of it at the time he signed the release on October 1, 1945 (57; 61-62).

Plaintiff filed his complaint herein on August 30, 1946 (2), being then represented by Messrs. Brown and Perlis. The defendant answered (8) on September 25, 1946, and set up as a bar to plaintiff's action the release (8) executed on October 1, 1945. On February 28, 1947, Emmet R. Burns, Esq., replaced Messrs. Brown and Perlis as plaintiff's attorney (9). On November 24, 1947 plaintiff's present counsel were substituted for Mr. Burns as attorneys of record for plaintiff (10).

On November 25, 1947, plaintiff's counsel, on behalf of plaintiff, wrote to defendant's attorneys in Los Angeles, California, enclosing a notice of rescission of release and offer to restore consideration executed by plaintiff (Pl. Ex. No. 5) (262). Defendant's counsel stipulated that the notice and offer to restore were received by defendant's attorneys (261). The offer to restore the consideration received from defendant by plaintiff was made in good faith (79) and with the ability to repay (79; 241-242.)

IV. SPECIFICATION OF ERRORS.

A. That the evidence adduced at the trial establishes, as a matter of law:

1. The liability of defendant; and

2. That the release, pleaded in defendant's answer, is invalid.

B. That the District Court erred in directing a verdict in favor of defendant.

C. That the District Court erred in holding that the release signed by plaintiff was, as a matter of law, a bar to this action. The evidence presented the following questions of fact relative to the purported release, each of which should properly have been determined by the jury:

1. The nature, extent, exacerbation and permanency of appellant's injury;

2. Whether appellant knew or suspected the nature, extent, exacerbation or permanency of his injury;

3. Whether the acts of the defendant railroad in dealing with appellant constituted fraud;

4. Whether, under the evidence, there was a mutual mistake of a material fact at the time of execution of the release;

5. Whether appellant had effectively rescinded the release; and

6. The validity of the release upon any one or more of the foregoing points one to five.

V. LIABILITY OF DEFENDANT ESTABLISHED AS A MATTER OF LAW.

Plaintiff put in his case and defendant adduced only the testimony of one medical witness (221) and moved for a directed verdict (263).

The evidence shows conclusively that plaintiff suffered an injury to his spine as a result of the collision between defendant's engine and the standing caboose in which plaintiff was working (35, 36, 37, 38).

The evidence shows negligence on the part of defendant as a matter of law (35, 36, 37, 38). Defendant was engaged in interstate commerce and plaintiff was acting within the course of his employment (26) at the time of the accident.

There is no evidence of contributory negligence.

The evidence shows that prior to the accident plaintiff had worked for defendant for a considerable period of time as a brakeman (70); that he was under no physical disability in performing his duties as such (86-87); that he, without knowledge thereof, had a degenerative disc between the 5th lumbar vertebra and the sacrum of his spine which, however, caused him no discomfort or disability (86-87; 223-225; 233-234).

The medical evidence—both plaintiff's and defendant's—shows that plaintiff's preexisting disc condition was exacerbated (223; 232-233); that the disc was crushed and rendered into a permanently disabling condition as a result of the trauma of the

accident (232-233). This was the proximate result of defendant's negligence.

Therefore, the issue of liability should be determined by this Court, as a matter of law, since there is no conflict in the evidence and the only reasonable inference which can be drawn is that defendant's liability has been established.

A. The release pleaded in defendant's answer is invalid as a matter of law.

The evidence shows, without conflict, that at the time plaintiff signed the release, he did not know that he was suffering from a crushed vertebral disc, or any disc, which would cause him to be disabled (57; 61-62); that when signing the release, he relied upon the statement of Dr. C. A. Morrison, chief surgeon of the Santa Fe Hospital at Los Angeles, California (who represented that plaintiff "could return to work on passenger service" and "would be all right within 30 to 60 days") (47-49), for the determination of the nature and extent of his injury suffered as a result of the accident (61-62).

The evidence is without conflict that *either*:

1. The defendant was ignorant, at the time the release was executed, of the permanent and serious nature of the injury to plaintiff; or,
2. If the true nature of the injury was known to defendant, then it was guilty of fraud.

Since there is no conflict in the evidence on these points, it follows that, as a matter of law, the release is invalid, whether under the theory of

1. Fraud;
2. Mistake; or
3. That California Civil Code § 1542 applies with regard to the unknown injury suffered by plaintiff.

B. Rescission was effected as a matter of law.

Where a release has been signed as a result of fraud, rescission and return of consideration are unnecessary.

Where Section 1542 of the California Civil Code applies with regard to an unknown injury, in the execution of a release, rescission and return of consideration are unnecessary.

Backus v. Sessions, 17 Cal. (2d) 380; 110 Pac.

(2d) 51;

O'Meara v. Haiden, 204 Cal. 354; 268 Pac. 334;

Meyer v. Haas, 125 Cal. 560; 58 Pac. 133;

Matthews v. A. T. & S. F. R. Co., 54 Cal. App.

(2d) 549; 129 Pac. (2d) 435.

Where, in the execution of a release, a mutual mistake of fact exists (constructive fraud), a rescission of the release is generally necessary to invalidate or avoid it.

Pac. Greyhound Lines v. Zane (C.C.A.-9th),
160 F. (2d) 736.

In the present case, the uncontradicted evidence discloses that the release was obtained by fraud—therefore rescission and tender of consideration to defendant were unnecessary. The uncontradicted evi-

dence likewise, discloses that plaintiff did not know he suffered from a crushed vertebral disc at the time he signed the release and the case therefore falls within the provisions of Section 1542 of the California Civil Code. Accordingly, no rescission or tender to defendant was necessary.

In any event *assuming* there was merely a mutual mistake of fact, the uncontradicted evidence discloses an effective rescission of the release by plaintiff.

The essential elements of rescission are set forth in Section 1690 of the Civil Code of California, to-wit:

“Rescission * * *, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

1. He must rescind promptly, upon discovering the facts which entitled him to rescind * * * *and is aware of his right to rescind; and*
2. He must restore to the other party everything of value which he has received from him under the contract; *or must offer to restore the same, upon condition that such party shall do likewise*, unless the latter is unable or positively refuses to do so.” (Emphasis added.)

Here, the evidence shows that plaintiff discovered the nature of his *real* injury on February 13, 1946 from Dr. Fenlon’s X-rays (59-61); that the plaintiff’s complaint was filed on August 30, 1946 (2); that the answer was filed on September 25, 1946 (8); *that plaintiff was not aware that the facts gave him a right to rescind the release until so informed by his present*

counsel on November 8, 1947; that on November 28, 1947, plaintiff mailed to defendant a written rescission and offer to restore the consideration upon condition that defendant return to him the signed release (262); that said offer was received and not acted upon (261); that plaintiff offered to restore the consideration in good faith and had the ability to do so, plus the credit of his attorneys to advance said sum if necessary (79; 241).

The defendant offered no evidence to prove *damage or prejudice* as a result of the time which elapsed between the release and rescission and, as a matter of law, plaintiff, under these facts, was not guilty of laches in rescinding after commencement of the action.

Robert Hind v. Silva (1935, C.C.A. 9th), 75 F. (2d) 549;

Carr v. Sacto Clay Prod. Co., 35 Cal. App. 439; 170 Pac. 446;

Hannan v. Steinman, 159 Cal. 142; 112 Pac. 1094;

Doak v. Bruson, 152 Cal. 17; 91 Pac. 1001;

Allen v. Chatfield, 172 Cal. 60; 156 Pac. 1001;

Hassom v. City of Long Beach, 83 Cal. App. (2d) 745; 189 Pac. (2d) 787;

Matthews v. A. T. & S. F. R. Co., 54 Cal. App. (2d) 549; 129 Pac. (2d) 435;

O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334;

Security Trust & Savings Bank v. Railroad, 214 Cal. 81, 88; 3 Pac. (2d) 1015;

Newport v. Halton, 195 Cal. 132, 231 Pac. 987;
Simmons v. Briggs, 69 Cal. App. 447; 231 Pac.
604.

Consequently, plaintiff did, as a matter of law, effectively rescind the release.

Therefore, the issue of validity of the release, whether upon the theory of fraud, mistake, or the rule of Civil Code § 1542, should be determined by this Court, as a matter of law, since there is no conflict in the evidence and the only reasonable inference which can be drawn is that the evidence has established it to be invalid.

Therefore, since, as a matter of law, defendant's liability to plaintiff is established and the pleaded release is invalid, this Court should instruct the District Court to order a new trial of the single issue of the extent of plaintiff's damage and enter judgment for plaintiff in that sum.

VI. GROUNDS REQUIRING REVERSAL OF JUDGMENT.

A. As pointed out above, it is plaintiff's position herein that the uncontradicted evidence adduced at the trial establishes as a matter of law:

1. Defendant's liability; and
2. That the release pleaded in defendant's answer is invalid.

B. Even if the foregoing ground were not well taken, the evidence *at least* presented the following

questions of fact, each separately treated hereafter, which should have been submitted to the jury:

1. The nature, extent and permanency of plaintiff's injury.

2. Whether plaintiff entered into the release under a mistaken belief as to the real nature of his injury.

3. Whether Civil Code Section 1542 applies, i.e., whether plaintiff "knew or suspected" he had a permanent injury.

4. Whether defendant, under the circumstances, was guilty of fraud.

5. Whether there was a mutual mistake of fact.

6. Whether plaintiff effectively rescinded the release.

7. Whether, under the circumstances, the release was valid.

C. The directed verdict was contrary to law.

"It is well settled that where a motion for non-suit is made, all evidence favorable to plaintiff's case must be accepted as true; that all reasonable inferences from the evidence must be drawn in favor of plaintiff; that it is error to grant the motion where there is any substantial evidence or reasonable inferences to be drawn from it which would support a judgment for plaintiff."

Engstrom v. Auburn Auto Sales Corp., 11 Cal.

(2d) 64, 66, 77 Pac. (2d) 1059;

Locke v. Meline, 8 Cal. App. (2d) 482-484, 48 Pac. (2d) 176 and cases cited therein.

It is settled that the same rules apply to a motion for directed verdict as to a motion for nonsuit.

Maestro v. Kennedy, 57 Cal. App. (2d) 499.

In the present case, there is not even a conflict in the evidence.

Under the Federal Employers' Liability Act, where a jury trial is demanded, the District Court *must* submit issues to the jury if the evidence *might* justify a finding either way on such issues. And a directed verdict should not be given where the evidence is such that fairminded men may draw different inferences. (*Wilkerson v. McCarthy*, 69 Sup. Ct. 413, 414, 417, 335 U.S. 807.)

Referring to *Callen v. Penn Ry. Co.*, 68 Sup. Ct. 296, 332 U.S. 625; 92 L. Ed. 235, the Circuit Court of Appeals (8th) in *Henwood v. Coburn*, 165 Fed. (2d) 418 at page 425 stated:

“* * * under the teaching of the recent decisions of the Supreme Court, the domain of the jury in circumstantial cases under the Federal Employers' Liability Act *may not be narrowly bounded*, and the settling of any question of negligence or proximate cause, where more than one rational possibility is involved on the evidentiary facts, is *exclusively* within its field. This is true for every purpose in the case, and, in according the jury its inherent function, recognition of the right in one aspect or incident of

a case is as important as in another.” (Emphasis added.)

D. Questions of Fact Raised by the Evidence.

1. The question of the nature, extent and permanency of plaintiff's injury should have been submitted to the jury.

The nature, extent and permanency of injury are questions of fact to be determined by the trier of fact—whether Court or jury. (*Callen v. Penn Ry. Co.*, 63 Sup. Ct. 296, 332 U.S. 625; 92 L. Ed. 235.)

The fact of plaintiff's injury is uncontradicted. The medical testimony of defendant's only witness corroborates and establishes the following facts:

- a. That plaintiff's preexisting degenerative disc was non-disabling (233);

- b. That as a result of his injury, this condition was caused to flare up and become exacerbated, and disabling (232-233);

- c. That this is a permanent condition and that plaintiff cannot perform his manual labor in the future (236); and

- d. That the fact that plaintiff returned to work *at all* after the accident *would not* indicate there was *no* exacerbation of the injury, *but would be helpful in evaluating the severity of the exacerbation* (239).

The testimony of plaintiff's medical witnesses establishes the fact of injury, exacerbation and permanency thereof, and the inability of plaintiff to pur-

sue his former occupation (135-172). In the light of such evidence, these questions should have been submitted to the jury.

In the *Callen* case, *supra*, at page 297, the Court said:

“An examination of the record at the trial makes it clear that *the issue was raised and sharply litigated as to whether the injury, if received by plaintiff, in the manner alleged, was permanent in character. Only when and if this issue was resolved in favor of one party or the other could it be known whether there was a basis for finding a mutual mistake or any mistake of fact in executing the release. The court, however, resolved the issue of permanence of injury against the defendant, at least so far as the release was concerned, and on that basis withdrew consideration of that issue from the jury.*” (Emphasis added.)

Under the ruling of the *Callen* case, the District Court, in directing the verdict for the defendant, took these questions from the jury. This was prejudicial error.

It is well settled that exacerbation or aggravation of a pre-existing condition presents a question of fact for the jury. In *Matthews v. A. T. & S. F.*, 54 Cal. App. (2d) 549, 129 Pac. (2d) 435, the Court states:

“The question whether the evidence does show with reasonable certainty that plaintiff’s future disability will result from the aggravation of his previous condition by his injuries rather than from the previous condition alone is *primarily one for the jury.*” (Emphasis added.)

It follows that the Court erred in not submitting the question of extent, exacerbation and permanency of injury to the jury.

2. The questions whether plaintiff had a mistaken belief as to the permanency of his injury and whether, if so, he entered into the release in question under such mistaken belief should have been submitted to the jury.

The uncontradicted facts disclose that when plaintiff signed the release in question, he thought that he could return to work on passenger service and would be "all right" within thirty to sixty days. In this, he relied upon the representations of Dr. Morrison, chief surgeon of defendant's hospital at Los Angeles, California. He did not know that he had any injury other than those he discussed with this doctor.

The evidence shows that plaintiff suffered an exacerbation of a pre-existing, non-disabling condition, which became permanently disabling as a result of this accident. He knew nothing about this permanent disability when he signed the release in question. Under such circumstances, the jury could well find that the plaintiff signed the release in question under a *mistaken belief* as to the permanency of his injury.

In directing the jury's verdict, the District Court ruled, as a matter of law, that plaintiff did not have a permanent injury and had no mistaken belief in that regard. These were purely questions of fact which should have been submitted to the jury.

The *Callen* case (supra) held that the failure of the District Court to submit to the jury, as a question of fact, the issue of whether or not the plaintiff entered into a release under the mistaken belief as to the permanency of his injury, constituted reversible error. *The District Court, in the case at issue, by directing the jury's verdict, did likewise.* Therefore, this was reversible error.

3. The question whether plaintiff "knew or suspected" that he had a "permanent" or "unknown" injury at the time of signing the release should have been submitted to the jury.

This question is similar to the question discussed in (2) supra. It becomes relevant in a separate and distinct manner by reason of §1542 of the Civil Code of California which provides as follows:

"A. general release does not extend to claims which the creditor *does not know or suspect to exist in his favor* at the time of executing the release, which if known to him must have materially affected his settlement with the debtor." (Emphasis added.)

This section applies to a personal injury release. (*Backus v. Sessions*, 17 Cal. (2d) 380; 110 Pac. (2d) 51.) The release in question was a *general* one. This section applies to the facts of this case. The plaintiff did not know or suspect, because of Dr. Morrison's representations, that a pre-existing non-disabling condition had been exacerbated by the accident into a permanently disabling one.

Under the cases which have interpreted this code section, it is held that the release is *valid only* as to

KNOWN injuries and has no application in regard to UNKNOWN injuries.

Backus v. Sessions, 17 Cal. (2d) 380; 110 Pac. (2d) 51;

O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334;

Meyer v. Haas, 126 Cal. 560, 58 Pac. 133;

Matthews v. A. T. & S. F. Ry. Co., 54 Cal. App. (2d) 549, 129 Pac. (2d) 435;

Pac. Greyhound Lines v. Zane (C.C.A. 8th), 160 F. (2d) 736.

Consequently, plaintiff's cause of action, even in the absence of fraud or mistake, would be barred by the release ONLY as to those injuries which he *knew or suspected* to exist. Since the evidence shows that he did not know or suspect his permanent injury, it follows that the release is not a bar to his recovery for such an injury.

South West Pump & Mach. Co. v. Jones (1937), (C.C.A. 8th), 87 F. (2d) 879.

It was error, therefore, to take from the jury the question whether plaintiff "knew or suspected" that he had such an injury at the time he signed the release. In directing the jury's verdict, the District Court ruled as a matter of law that plaintiff knew about his permanent injury when he signed the release. This, again, was a question of fact which should properly have been submitted to the jury.

Jordan v. Guerra, 23 Cal. (2d) 469, 144 Pac. (2d) 349;

Matthews v. A. T. & S. F. Ry. Co., 54 Cal.
App. (2d) 549, 129 Pac. (2d) 435;
Cullen v. Penn R. Co., supra.

4. The question of fraud should have been submitted to the jury.

The evidence shows that defendant failed to reveal to plaintiff the real nature and extent of his injuries, although such information was within its possession and power to do so.

Plaintiff was admitted to the Santa Fe Hospital at Los Angeles, California, on August 14, 1945. He was there ten days. X-rays taken by defendant's hospital doctors showed plaintiff to be suffering from a crushed, degenerative vertebral disc between the fifth lumbar vertebra and the sacrum. Plaintiff was not informed by these doctors that he had such an injury, but was discharged from the hospital in a disabled condition. His actual injury, permanently disabling, was concealed from plaintiff. He knew nothing about it. He was given an unqualified release from the hospital.

The evidence further shows that defendant's doctors misrepresented plaintiff's condition to him. On September 19, 1945, plaintiff went to see Dr. C. A. Morrison, chief surgeon in charge of the Santa Fe Hospital at Los Angeles, to discuss his physical condition which, at that time, had not improved since the date of the accident. Dr. Morrison then and there represented to plaintiff:

(a) That plaintiff was “*all right*” and could return to work;

(b) That plaintiff should “start work on passenger service”; and

(c) That plaintiff “would be all right within 30 to 60 days”.

Because of these misrepresentations, and the failure to reveal the x-ray findings to him, plaintiff did not know the real nature and extent of his injury. He did not learn of the real nature of his injury until examined by Dr. Fenlon and x-rays showed the same on February 13, 1946. He had no prior knowledge of a pre-existing degenerative disc. Whatever his spinal condition was prior to the accident, it was non-disabling. This condition was exacerbated and caused to become permanently disabling by the crushing resulting from the trauma of the accident.

Relying upon the misrepresentations of Dr. Morrison, plaintiff returned to Needles, California, to settle with the defendant in order to return to work. He negotiated settlement on this basis, and on October 1, 1945 executed the general release in question.

The evidence is uncontradicted that plaintiff did not *KNOW OR SUSPECT* the real nature, extent or permanency of his injury at the time he signed the release.

The evidence shows conclusively that the defendant's doctors did not reveal to plaintiff the findings

of the x-rays taken at the defendant's hospital. Likewise, that Dr. Morrison's representations to plaintiff were untrue; that plaintiff was not able to return to work even on passenger service and certainly was not "all right within 30 to 60 days", and to the contrary, suffered a permanent injury.

The jury could readily infer that the failure to reveal such information as contained in the x-rays and the representations made by the company doctor, were deliberate and fraudulent and that plaintiff relied upon them in signing the release; that such concealment and misrepresentations were made with the intent to defraud plaintiff and to conceal his real injury so that he would settle with defendant company for a modest sum, thereby avoiding payment by defendant of a sum commensurate with plaintiff's real and permanent injury. See:

A. T. & S. F. Ry. Co. v. Peterson, 34 Ariz. 292, 271 Pac. 406;

Matthews v. A. T. & S. F. Ry. Co., 54 Cal. App. (2d) 549, 129 Pac. (2d) 435;

Backus v. Sessions, 17 Cal. (2d) 380, 110 Pac. (2d) 51;

Jordan v. Guerra, 23 Cal. (2d) 469, 144 Pac. (2d) 349;

Meyer v. Haas, 126 Cal. 560, 58 Pac. 133;

Irish v. Central Vt. Ry., 164 F. (2d) 396;

Thompson v. Camp, 153 F. (2d) 396;

Pac. Greyhound Lines v. Zane (C.C.A. 8th), 160 F. (2d) 736.

5. The question of mistake should have been submitted to the jury.

Assuming that defendant acted in good faith in dealing with plaintiff and was not aware of plaintiff's crushed vertebral disc which caused his permanent disability, at the time of execution of the release, the evidence shows that plaintiff, likewise, was not aware of such disability. It follows that there was a mutual mistake as to the existence of a material fact when the release was executed.

This point is fully covered in *Matthews v. A. T. & S. F. Ry. Co.*, 54 Cal. App. (2d) 549, 129 Pac. (2d) 435. The Court states (p. 558):

“The statement made to plaintiff by defendant's physician, that he had recovered, *was one of fact. It was believed by plaintiff and if it was believed by the physician, the case is one of mutual mistake. If the statement was not believed by the physician we have a case of fraud.*” (Emphasis added.)

The representations of Dr. Morrison were statements of fact and not merely a mistaken medical opinion as to future developments. Here, Dr. Morrison, told plaintiff that he was “all right” and “could return to work on passenger service” and that he “would be all right within 30 to 60 days”. These were statements of material facts as to the seriousness of the injury sustained by plaintiff and his present condition at the time.

Union Pac. R. Co. v. Zimmer, 87 A.C.A. 611, 197 Pac. (2d) 363.

In the *Union Pac. R. Co. v. Zimmer* case (*supra*) the Court states at page 616:

“As was said in *Scheer v. Rockne Motors Corp.* (2 Cir.), 68 F. 2d 942, 945 (holding a release voidable for mutual mistake), ‘There is indeed no absolute line to be drawn between mistakes as to future, and as to present facts. To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; *it is an assurance as to his present condition and so understood.*’ (See also, *Tulsa City Lines v. Mains* (10 Cir.), 107 F. 2d 377, 381.)” (Emphasis added.)

In this connection, the rule appears to be well settled that a release for personal injuries is invalid where executed as a result of the attending surgeon’s erroneous or false statement of opinion concerning the physical condition of the releasor.

So. West Pump & Mach. Co. v. Jones (C.C.A. 8th), 87 F. (2d) 879;

Steele v. Erie R. Co., 54 F. (2d) 688;

Lion Oil Ref. Co. v. Albritton (C.C.A. 8th), 21 F. (2d) 280;

A. T. & S. F. Ry. Co. v. Peterson, 34 Ariz. 292, 271 Pac. 406;

Thompson v. Camp, 163 F. (2d) 396;

Lumley v. Wabash R. Co., 76 Fed. 66, 67;

Southern Ry. Co. v. Clark, 233 Fed. 900, 904;

Great Northern Ry. Co. v. Fowler, 136 Fed. 118.

In the *Zimmer* case, *supra*, the Court states at page 617:

“* * * on principle, it would seem *immaterial what the source of the information* giving rise to a mutual mistake *might be*. (Tulsa City Lines v. Mains (2 Cir.), 107 F. 2d 377, 381.)” (Emphasis added.)

The same Court, at page 615, states:

“Each case, of course, *must* be considered on its own facts, and the question of mutual mistake is normally one for the trier of fact. (45 Am. Jur., Release, sec. 49, p. 708.)”

See also:

Callen v. Penn. Ry. Co., 68 S. Ct. 296, 332 U. S. 625, 92 L. Ed. 235;

Jordan v. Guerra, 23 Cal. (2d) 469, 144 Pac. (2d) 349;

Matthews v. A. T. & S. F. R. Co., 54 C. A. (2d) 549, 129 P. (2d) 435;

Backus v. Sessions, 17 Cal. (2d) 380, 110 P. (2d) 51;

O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334;

Wilkerson v. McCarthy, 69 S. Ct. 413, 335 U. S. 807 (cert. granted).

From the foregoing authorities, it is apparent that the District Court erred in failing to submit to the jury the question of mutual mistake.

6. **The Court erred in taking from the jury the question whether plaintiff had effectively rescinded the release.**

Where fraud is found to exist, rescission is unnecessary. Here, the jury could readily infer defendant's fraud. Once established, fraud vitiates the release and

rescission and restoration of consideration are unnecessary.

Irish v. Cent. Vermont Ry., 164 F. (2d) 396;

A. T. & S. F. v. Peterson, 34 Ariz. 292, 271 P. 406;

Brown v. Penn. R. Co., 158 F. (2d) 795.

Where Section 1542 of the Civil Code of the State of California applies, rescission and tender of consideration are likewise unnecessary for the reason that no consideration has been received for the UNKNOWN injury and therefore nothing need be restored or tendered to the other party. Here, the jury could reasonably have found that plaintiff's injury was UNKNOWN to him at the time he signed the release and therefore the consideration which he had received from the defendant need not be returned because the release was binding as to KNOWN injuries and plaintiff had agreed to said sum as compensation for the KNOWN injuries ONLY. Consequently, rescission and tender of the money received by plaintiff to defendant were unnecessary.

Backus v. Sessions, 17 Cal. (2d) 380, 110 P. (2d) 51;

O'Meara v. Haiden, 204 Cal. 354, 268 P. 334;

Jordan v. Guerra, 23 Cal. (2d) 469, 144 P. (2d) 349.

Only where the invalidity of the release is based upon a mutual mistake of fact is it necessary to rescind. Under the facts herein, the jury could well have found that plaintiff had effectively rescinded the release and that defendant had suffered no prejudice

or damage as a result of any delay in rescinding; and further, that plaintiff's use of the settlement money did not constitute a ratification thereof.

Hind v. Silva (C.C.A. 9th), 75 F. (2d) 174.

7. The question of validity of the release signed by plaintiff should have been submitted to the jury.

The evidence shows that plaintiff executed the release upon the misrepresentations of the defendant's doctor. The evidence also shows a serious and permanently disabling injury to plaintiff's spine. There is no evidence to contradict the permanency of this injury. Under such facts, it was error for the District Court to withdraw the question of validity of the release from the jury.

In the *Callen* case, *supra*, at page 297, the Supreme Court states:

“Even if the issue of *permanence* were resolved against the defendant, an issue still existed as to *validity of the release* since the defendant insists that it did not act from mistake as to the nature and extent of the injuries but entered into the release for the small consideration involved because, upon the evidence in its hands at the time, no liability was indicated. *We think the defendant was entitled to argue these contentions to the jury and to have them submitted under proper instructions.*” (Emphasis added.)

In directing the jury's verdict in the case at issue, the District Court not only ruled, as a matter of law, that plaintiff suffered no permanent injury, but also that the release was valid, despite the evidence which

clearly indicates (1) fraud; (2) mutual mistake; or (3) that Section 1542 of the Civil Code of California applies as to plaintiff's UNKNOWN injury. The jury could reasonably have found that the release was invalid on any one or all of the above bases. Therefore, these issues should have been submitted to the jury. It was prejudicial error not to do so.

VII. CONFLICT WITH SUPREME COURT DECISIONS.

Appellant respectfully urges that the judgment of the District Court is directly in conflict with the decisions of the United States Supreme Court in the cases of *Callen v. Penn. R. Co.*, 68 S. Ct. 296, 332 U. S. 625, 92 L. Ed. 235, and *Wilkerson v. McCarthy*, 69 S. Ct. 413, 335 U. S. 807 (cert. granted).

VIII. CONCLUSION.

Appellant prays that this Court instruct the District Court to order a new trial and to submit to a jury the single issue of the extent of plaintiff's damage, or, at least, to submit to a jury the questions of fact set forth herein.

Dated, San Francisco, California,
March 15, 1949.

Respectfully submitted,

PHILANDER BROOKS BEADLE,
ERNEST E. EMMONS, JR.,
Attorneys for Appellant.

No. 12,099

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE H. GRAHAM,

Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD (a corporation),

Appellee.

APPELLEE'S BRIEF.

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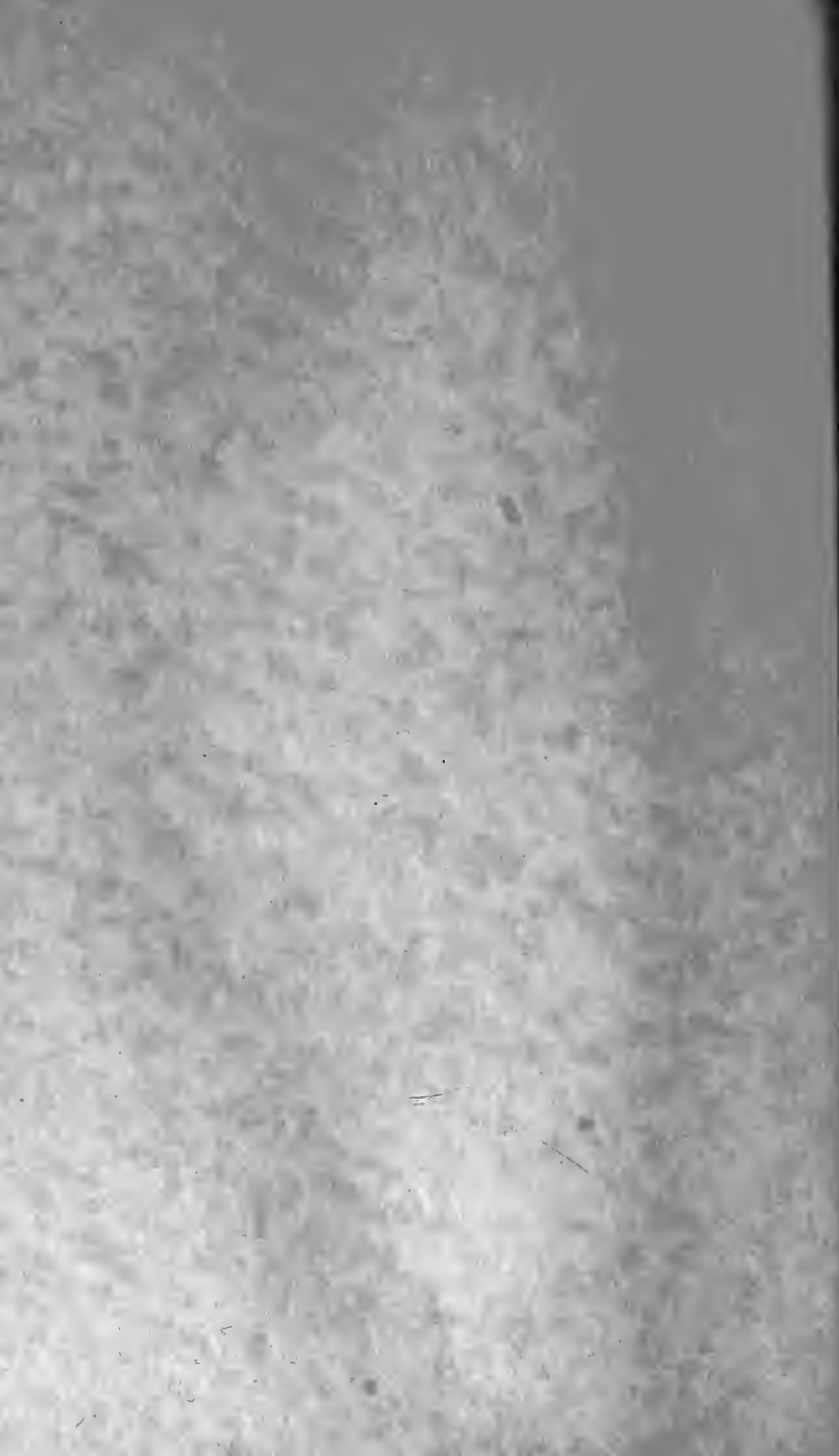
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FILED

APR 15 1949

L. P. O'BRIEN,

CLERK



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Appellee.

APPELLEE'S BRIEF.

Summary.

Appellant executed a release in writing covering all claims, known or unknown, against the appellee. He relied upon no representations in making it. He never rescinded this release; in fact, he did not have the money at his command to restore the consideration. There was no attempt to rescind as shown by the evidence, since the instrument by which a rescission might have been attempted was never offered in evidence. The consideration of the release, \$1,050.00, was retained by appellant; it is conceded that this would not have been fatal had fraud been proved, but it was not. No actionable fraud is shown by the record. Under the facts the appellant was not entitled to rescind

in any event. There was no concealment of the facts as to the injuries; they were fully known to the appellant. The settlement covered by the release was fair; the consideration was not at all out of proportion to the injuries. The court followed the law in granting a directed verdict.

I.

No Rescission of the Release Was Effected.

On the 1st day of October, 1945, appellant signed a release, which release is in words and figures as follows [T. R. 179]:

“For the sole and only consideration of \$1,050, the receipt of which is hereby acknowledged, I hereby release and forever discharge the Atchison, Topeka & Santa Fe Railroad Company, Coast Lines, its agents and employees from any and all claims and demands which I have now or may hereafter have on account of any or all injuries, including any injuries which may hereafter develop as well as those now apparent, sustained by me at or near Needles, California, on or about July 6, 1945, while employed as brakeman; also for loss or damage to personal property. In making this settlement, I am not relying upon any statement made by any agent or official of said Company as to what my injuries are or how serious they are or when or to what extent I may recover therefrom. It is definitely understood that in making this settlement, no promise or representation has been made relative to future employment.

“I have read the above release and understand the same. In Witness Whereof, I hereunto set my hand and seal this first day of October, 1945.

“G. H. Graham. Then follows the word ‘Seal’ and the word ‘Witnesses’, then the names ‘Rosalie Dondero’ and ‘F. H. Hitchcock.’ ”

The appellant received appellee's check for \$1,050.00, cashed it, and used the money. There is no record in the case that he either offered to rescind or was able to offer to rescind at any time. [T. R. 183.] The record in regard to this is as follows:

"The Court: Well, what the attorney wants to know is, you never actually tendered the \$1,050 in money to anybody in the Santa Fe?

The Witness: Oh, I may have tendered it, Judge.

The Court: Beg pardon?

The Witness: I have had that much money, yes.

The Court: No, no, the lawyer wants to know whether you actually went to anybody in the Santa Fe and offered them \$1,050 in money at any time.

The Witness: I made that request of my attorney.

The Court: Well, now I think you understand what I am talking about; we know you wrote a [T. R. 184] letter, but what the attorney wants to know is, did you take \$1,050 in money down to the Santa Fe and say, 'Here, I offer it to you, I want to have this release changed.'?

The Witness: I understand you now. No, I didn't.

Mr. Baraty: Q. You didn't do that, and you didn't tell your lawyers to deliver \$1,050 to the Santa Fe Railroad? A. How's that?

Q. You didn't tell your lawyers to deliver \$1,050 to the Santa Fe Railroad, did you? A. Well, I don't remember just what I did tell them, but something along that line, that I was ready to give the payment back or—

Q. Did you tell your lawyers to deliver \$1,050 to the Santa Fe Railroad? A. I don't remember.

Q. You don't remember. What is the best memory you have on it? Yes or no. A. I am hazy on lots of things. I just don't know. * * *

[T. R. 241] redirect examination of Mr. Graham by Mr. Emmons:

"Q. Now, this money that you received from the Santa Fe Railroad, did you have a sufficient amount of money or credit to pay that money back to the Santa Fe Railroad? A. I believe I could have gotten it together at the time, if it had been demanded of me.

Q. Did you have any agreement with your lawyers in regard to paying that man? A. Yes—well, yes.

Q. What was the agreement? A. In the event I couldn't get it all together, they would help me out on it."

WHAT OFFER TO RESCIND WAS MADE?

Plaintiff's Exhibit No. 5 [T. R. 261-262] reads as follows:

"November 25, 1947.

Messrs. Sievert and Ewing,
Attorneys at Law
121 East 6th Street,
Los Angeles, California

Re: Graham vs. Santa Fe Railroad.

Gentlemen:

Enclosed please find file-marked copy of Substitution of Attorneys in the captioned case, wherein this office replaces Emmett R. Burns, Esq., as attorney of record.

Also enclosed, please find a Notice of Rescission of Release and Offer to Restore Consideration executed by Mr. Graham. Kindly advise us of your wishes in this respect.

Very truly yours,

PHILANDER BROOKS BEADLE,

By

For some reason counsel for appellant omitted offering in evidence any Notice of Rescission of Release and Offer to Restore Consideration. There is, therefore, before the Court no evidence of any rescission, or offer to rescind or to restore the consideration.

Appellant's counsel in their brief at page 7, said:

"On November 25, 1947, plaintiff's counsel, on behalf of plaintiff, wrote to defendant's attorneys in Los Angeles, California, enclosing a notice of rescission of release and offer to restore consideration executed by plaintiff [Pltf. Ex. No. 5] (262). Defendant's counsel stipulated that the notice and offer to restore were received by defendant's attorneys (261)."

This is not true. We will quote from the record [T. R. 261]:

"Mr. Emmons: Now, will counsel stipulate that on November 25, of 1946, our office sent a letter to Messrs. Sievert and Ewing, attorneys for the Santa Fe Railroad in Los Angeles?

Mr. Baraty: Let's see the letter. Maybe we can tell (examining). Yes, we will stipulate that that was sent and that we received it.

Mr. Emmons: And I would like to offer in evidence, a letter dated November 25, 1947, directed to Messrs. Sievert and Ewing, Attorneys at Law, 121 East 6th Street, Los Angeles, and may it be admitted in evidence, your Honor?

The Court: All right.

The Clerk: Plaintiff's No. 5.

(Letter dated 11/25/47 referred to above was received in evidence as Plaintiff's Exhibit No. 5.)

Mr. Baraty: We received that letter in our office in San Francisco. We admit the receipt of it.

Mr. Emmons: I would like to read this to the jury (reading)."

Counsel then read to the jury Plaintiff's Exhibit No. 5. The Court will observe that there is nothing in the stipulation and nothing in Plaintiff's Exhibit No. 5 that tells us the contents of any enclosure that may or may not have been in the letter of November 25, 1946. This Court has no knowledge, therefore, of any offer to rescind or to restore the consideration.

The fact, if it be a fact, that the appellant on November 25, 1946, directed to the appellee a rescission of the release of October 1, 1945, and an offer to return the consideration cannot be considered on appeal where such instrument does not appear in the evidence.

Winstanley v. Ackerman, 110 Cal. App. 641.

II.

**Rescission, Even if One Were Made, Would Not Have
Been Timely.**

Even if a rescission had been attempted at this time, it would have been too late. The contract for release was entered into October 1, 1945. Appellant had full knowledge of his physical condition from Dr. Fenlon on February 13, 1946, as he testifies [T. R. 59], yet there is no suggestion of any rescission until November 25, 1947, a year and nine months thereafter, and no reason whatever is given for the delay.

The retention of the consideration by one *sui juris* with knowledge of the facts, will amount to a ratification of a release executed by him in the settlement of a claim, where the retention is for an unreasonable time under the circumstances of the case.

45 *Am. Jur.* page 690, Section 25;

Komer v. Shipley (Circuit Court of Appeals—Fifth Circuit), 154 F. 2d 861.

III.

Release Was Not Result of Mutual Mistake.

There is no factual evidence of mutual mistake regarding the nature or extent of appellant's injuries which resulted from the accident of July 6, 1945. The degenerative disc which appeared in the X-rays taken at the Santa Fe Coast Lines Hospital August 6, 1945, was not the result of the accident of July 6, 1945, according to the evidence of both plaintiff and defendant in the Transcript of Record and the argument in the Brief for Appellant [T. R. 157]:

Testimony of Dr. F. G. Niemand:

“Q. But you are not able to say when the trauma existed or when it was created? A. No, I couldn’t do that. I mean, putting a date on it, like the X-rays have a date. I could say relatively.

Q. Could it have happened ten years before this accident? A. No, I don’t think that long.

Q. Five years? A. More likely.

Q. More likely five years? A. Maybe five, I don’t know. It is hard to say. It is very difficult to say, because it can come—you have to realize this—from such inconsequential trauma that the patient may not be aware of it until X-rays are taken.”

[T. R. 170] testimony of F. G. Niemand:

“Q. To the best of your opinion, the condition depicted by these X-rays, the three that you put on the box and that were offered by counsel for Mr. Graham, could have existed prior to July 6, 1945? A. Uh-huh (affirmative).”

[T. R. 159] testimony of F. G. Niemand:

“Q. In your opinion, how long prior to the taking of this X-ray film has that calcification existed? A. It depends; that can’t be ascertained, because it depends upon the—nature puts out this material as quickly as it needs it, and that can come very rapidly with a severe injury, and with a man that has the weight this man has, this could make itself appear in relatively quick time.

Q. I was going to say rapidly is a relative term? A. That’s right.

Q. Now just what do you desire for us to understand by your use of the word ‘rapidly’ in connection with the question I have just put? A. I would say within a few years.

Q. A few years. So that in February of 1946, the calcification that you read on the film that is now in the box, in your opinion, would be a few years duration? A. Uh-huh, as far as I could ascertain.

Q. And when you say that, you are mindful of the fact, are you, that the injury claimed to have occurred here is alleged to have happened on the 6th of July, 1945? A. Counsel, the things that you have to realize are that symptoms and pathology are not concomitant. By that I mean that you may have a considerable pathology and very few symptoms and very little pathology, and a great deal of symptoms. In other words, this man could have had such a disability giving him very little trouble until an acute blow (indicating) which flares it up in a marked degree."

(Brief for Appellant p. 9):

"The evidence shows that prior to the accident plaintiff * * * without knowledge thereof, had a degenerative disc between the 5th lumbar vertebra and the sacrum of his spine which, however, caused him no discomfort or disability."

Therefore, there was no mutual mistake in believing that there was no injury to the spine as a result of the accident, in the form of a degenerative disc. It would have, on the contrary, been a mutual mistake if they had thought that the accident did result in a degenerative disc.

It was impossible for appellant to have been mistaken as to the extent of the flare up of the symptoms accompanying his degenerative disc of long standing, since he himself was the best judge of the severity of his own pain and limitation of motion, if any.

IV.

Release Was Not Result of Fraud or Undue Influence.

Counsel for appellant in their argument claim that in a case of fraud a return of the consideration is unnecessary. We have here, however, no evidence of fraud on the part of the appellee. Appellant claims that Dr. Morrison [T. R. 47] "told me to go back to work if I possibly could, that the company was very short of men and that they needed to keep the trains operating—the war was still on, and to go back and take it easy, that I would be all right in thirty or sixty days." Appellant further quoted Dr. Morrison as saying [T. R. 48]: "Go back and take it easy, you will be all right, you can get along."

The remarks attributed to Dr. Morrison by the appellant were in no manner calculated to deceive. His words, if correctly quoted, did not amount to any representation upon which appellant was entitled to rely. It was not evidence of fraud.

There could be no question of undue influence used on appellant to induce him to settle by refusing to let him work until he signed a release. Although Mr. Graham pleads ignorance of the abrogation of Rule 304 which formerly required settlement before returning to work [T. R. 70], nowhere in the evidence does he even state that he believed that it was actually necessary for him to settle before returning to work. The evidence shows that he knew that he could return to work before obtaining a release, first, in that he actually made a run for which he was paid on Sep-

tember 30, 1945 [T. R. 128] before he came to Los Angeles and signed the October 1, 1945, release; and second, in that he had a lawsuit still pending in the Los Angeles Superior Court against the Santa Fe for an injury to his hand received in 1943, which he had never settled prior to returning to work in 1943, and for which he had signed no release. [T. R. 68, 69.]

V.

The Appellant Was Not Entitled to Rescind in Any Event.

The clear intention of the appellant was to release all claims, known or unknown, growing out of the accident. By its express terms the release discharged the appellee "from any and all claims and demands which I have now or may hereafter have on account of any or all injuries, including any injuries which may hereafter develop, as well as those now apparent, sustained by me at or near Needles, California, on or about July 6, 1945, while employed as brakeman."

He further stated:

"I am not relying upon any statement made by any agent or official of said company as to what my injuries are or how serious they are or when or to what extent I may recover therefrom."

Appellant's unmistakable intention was to release the appellee from all claims, known or unknown, growing out of the accident. In *Berry v. Struble*, 20 Cal. App. 2d 299, our District Court of Appeal said, at page 301:

"Plaintiff contends that Section 1542 of the Civil Code applies to the facts, and that therefore the release did not extend to the physical conditions which

subsequently appeared and of which she was ignorant at the time of its execution.”

And further said, at page 303:

“While there is evidence in the record which, as the defendant claims, tends to show that plaintiff was not suffering from an unknown injury when the release was executed, we prefer to place our decision on the ground that the clear intention of the parties was to compromise and release all claims, known or unknown, growing out of the accident; and this being true, no ground for rescission was shown.”

In *Pacific Greyhound Lines v. Zane, et al.*, 160 F. 2d 731, this court cited the *Berry* case and said, at page 736:

“In the absence of *actual fraud*, the express waiver of all rights under this section (Sec. 1542 of California Civil Code) was valid.”

Since it has already been observed that the release was not the result of fraud, its terms are binding and conclusive.

VI.

Injuries From Accident Were Fully Known to Appellant.

The uncontroverted evidence is that the condition of the degenerative disc was not brought about by the accident of July 6, 1945. [T. R. 157, 159, 170, 236.] The only result of the accident as shown by the evidence, beyond the usual bruises and contusions about which plaintiff was informed by several doctors, was a possible flare up to some degree of the symptoms of the degenerative disc. The degree of the flare up or exacerbation was indicated by the pain accompanying his movements and the resulting limita-

tion of movements. The plaintiff could not help but be aware of the severity of his pain and impairment of his own movements. Therefore, such a flare up could not be unknown to him at the time he executed the release on October 1, 1945.

Appellant in his Brief, at page 9, states that as a result of the accident the disc was crushed and rendered into a permanently disabling condition. The actual process of how a disc is degenerated was described by Dr. Niemand in the evidence [T. R. 155] :

“Well, it is the idea that one vertebra is on top of the other, and when the fluid which holds the two apart is gone, then the bone against bone [indicating] crushes the cartilage, which is sort of soft tissue, by the contact, the constant movement of the back, which goes through various motivations. It keeps on crushing, crushing, crushing, until it just degenerates. It breaks up, it smashes, it disintegrates that particular disc.”

Since this is usually a process covering years [T. R. 157, 226], there must be factual evidence to show that it occurred suddenly as the result of one accident. There is no such evidence. On the contrary, the evidence contains a description of plaintiff driving his car [T. R. 110, 121], insisting on leaving the hospital at Los Angeles [T. R. 123], and working for about forty-five days after the accident until his discharge for violation of Rule G. [T. R. 62.] This evidence indicates that he was not disabled following the accident.

VII.

The Settlement Covered by the Release of October 1, 1945, Was Fair and Equitable.

In speaking of this payment of \$1,050.00, the appellant said [T. R. 131]: "Well, he offered me a settlement which was fair." In fact the appellant's activities in driving his car [T. R. 110, 121], in voluntarily leaving the hospital [T. R. 123], and his desire to return to work [T. R. 126, 127], all indicated that he was not suffering from any severe flare up of the symptoms of any degenerative disc of long standing.

Dr. Soto-Hall evaluates this flare up as follows [T. R. 239]:

"A. Well, the fact he was able to carry on for several months, if that is true—I don't know it to be true—if a man is able to continue with regular normal work for several months, I have granted he could have as a result of the accident a flare up. Evaluating the flare up, the amount to me, these factors must be considered. First, we know he must have discomfort before, from an examination of his spinal films. Two, from the fact that he went back to work, I would say that his flare up wasn't too great; but I have granted that he could have a flare up as a result of the accident."

VIII.

**The Record Required the Trial Court to Grant a
Directed Verdict.**

The opinion of the trial court was entirely in accordance with the facts and the law when, in directing the verdict in favor of the appellee, His Honor said [T. R. 264]:

“In the opinion of the Court, the evidence presented on behalf of the plaintiff, who has submitted his cause, raised no question of fact that requires resolution by the jury. On the contrary, it is my opinion that the evidence discloses that no circumstances presented by the evidence and recognized by the law requires any change or rescission of the agreement that the parties entered into on the 1st day of October, 1945.

“The evidence shows that this agreement was entered into under no compulsion, for a fair consideration, and that both parties had in mind the consideration as that related to the purposes and objects of the agreement.

“Furthermore, no timely rescission or attempted rescission of this agreement is shown by the evidence. The evidence does not disclose any factual matter with respect to any mistake or fraud or undue influence in connection with the execution of this agreement.

“Consequently, there is nothing for the jury to pass upon. The Court finds that there are no circumstances of any kind disclosed by the evidence to justify the rescission of this settlement, which appears to have been a fair and equitable one, and not made under mutual mistake of any kind at the time, or induced by any fraud or undue influence.

“For the reasons that I have stated, the motion for a directed verdict will be granted.” [T. R. 265.]

It is the duty of the judge to direct the verdict when the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a verdict for the other party.

Western and A. R. Co. v. Hughes, 278 U. S. 496-499, 73 L. Ed. 473.

The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case can be properly left to the discretion of the tryer of fact, in this case the jury. * * * When the evidence is such that, without weighing the credibility of the witnesses there can be but one logical conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischances of speculation over legally unfounded claims.

Brady v. Southern Railway Company, 320 U. S. 476-489, 88 L. Ed. 239.

In view of the evidence in this case we are of the opinion that under the law the judgment of the trial court should be affirmed.

Respectfully submitted,

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No. 12,099

IN THE
United States Court of Appeals
For the Ninth Circuit

GEORGE H. GRAHAM,

Appellant,

VS.

THE ATCHISON, TOPEKA & SANTA FE
RAILROAD (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

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IN THE

**United States Court of Appeals
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GEORGE H. GRAHAM,

Appellant,

VS.

THE ATCHISON, TOPEKA & SANTA FE
RAILROAD (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's brief is but a denial of plaintiff's evidence in the record showing:

- (1) That rescission of the release was effected;
- (2) That rescission was timely;
- (3) That the release was the result of mutual mistake; or
- (4) Fraud;
- (5) Plaintiff's right to rescind;
- (6) That plaintiff did not know about his permanent disability at the time he executed the release; and
- (7) That the settlement, in the light of plaintiff's permanent injury, was unfair and inequitable.

These points will be discussed separately and briefly in the following paragraphs. However, it should be noted that these same points are fully covered by the points raised in appellant's opening brief.

I.

On page three of appellee's brief it is stated that "There is no record in the case that he (Appellant) either offered to rescind or was able to offer to rescind at any time."

and cites the record (183)* to support this. In the discussion cited in the record, the trial Court and counsel evidently were of the opinion that it was a condition precedent to a valid rescission that plaintiff had to *actually produce and tender to defendant the sum of \$1050 in cash*. Obviously this is not the law, since plaintiff was not obliged to tender cash. His offer was sufficient. As a matter of fact, defendant is *estopped* to deny a valid tender since no objection was raised thereto.

Doak v. Bruson, 152 Cal. 17, 20;

Allen v. Chatfield, 172 Cal. 60, 62;

Hassom v. City of Long Beach, 83 Cal. App. (2d) 745;

California Code of Civil Procedure, section 2074.

*Unidentified arabic numerals in parentheses refer to the pages of the record.

“A tender is not necessary where the declarations of the offeree are such as to indicate that the actual offer of money will be rejected; the law does not require a man to do a vain and fruitless thing; a strict and formal tender is not necessary where it appears that if it had been made it would have been refused (*Hoppin v. Munsey*, 185 Cal. 678, 685 (198 Pac. 398)).”

Hassom v. City of Long Beach, 83 Cal. App. (2d) 745, 750, 751.

Under such reasoning, from the time of defendant's answer, setting up the release in bar to plaintiff's complaint, tender would have been a “fruitless” gesture, since by defendant's answer was revealed its intent to steadfastly hold to the terms of the release.

A. Rescission was made.

Counsel for defendant, at this point of the case, now appear to *crawfish* from a stipulation entered into regarding the receipt of the notice of rescission.

The record (261) as shown in appellee's brief, page 5, shows that defendant's counsel stipulated that defendant received the letter in question (Plaintiff's Exhibit No. 5) (261-262); that the letter itself states that the notice of rescission and offer to restore were enclosed therein; that defendant's counsel made no objection that said notice and offer were not so enclosed, but, by his stipulation agreed to the receipt of *both*. Consequently, there can be no doubt that both counsel and defendant were notified of plaintiff's rescission and offer to restore the \$1050 to the defendant.

Because counsel for defendant choose to stand upon such a technicality, thereby reneging on the stipulation which all counsel understood to mean receipt, not only of the *letter*, but also its *enclosures*, the Court's attention is directed to Section 1963(20) of the California Code of Civil Procedure, setting forth the rebuttable presumption: "20. *That the ordinary course of business has been followed.*"

Certainly, *in the ordinary course of the business of a law office, an enclosure mentioned as "enclosed" in a letter will accompany the letter to its destination.* Under the cited code section, this is *presumed* to have been done in the ordinary course of business until rebutted by competent evidence. Counsel, at the time of entering into the stipulation in question, did not *then* state that the *enclosures* had not been received. It follows therefore, that there is no evidence in the record to rebut this presumption, despite counsel's attempt to do so at this late date. Hence there can be no dispute but that defendant received the notice of rescission and offer to restore. Consequently, there is substantial evidence in the record for the Court to legitimately infer that said notice and offer were sent by the plaintiff and received by the defendant.

The document itself is unnecessary, because, even if set forth verbatim in the record, it would only set forth the ultimate fact of notice of rescission and offer to restore the consideration to defendant. This fact is proved by the stipulation and the presumption mentioned above. Hence *Winstanley v. Ackerman*, 110 Cal. App. 641, cited by appellee, is not controlling or

in point. Further, this case may be distinguished from the instant case on the ground that there was *no* evidence of any kind in the *Winstanley* case from which a *tender* could be inferred by the Court. In the instant case the record justifies the inference of receipt by defendant of the notice of rescission and offer to restore the consideration to defendant.

- B. There is substantial evidence to justify an inference of plaintiff's ability to pay pursuant to his offer to restore the consideration.**

The evidence in the record speaks for itself:

(79) "Q. Also, I neglected to ask you yesterday, at the time you offered to return the \$1050 to the defendant railroad, did you have that amount of money to repay them?

A. I did, yes.

Q. And was that offer made in good faith?

A. It was."

(241) "Q. Now, this money that you received from the Santa Fe Railroad, did you have a sufficient amount of money or credit to pay that money back to the Santa Fe Railroad?

A. I believe I could have gotten it together at the time, if it had been demanded of me.

Q. Did you have any agreement with your lawyers in regard to paying that man? (money)

A. Yes—well, yes.

Q. What was the agreement?

A. In the event I couldn't get it all together, they would help me out on it."

"Q. (By Mr. Emmons) At the time that you executed this release, did you have some property up there in Searchlight?

A. I did.

Q. Did you own that property?

A. I did.

Q. Do you still own it?

A. I still own it.

Q. Did you own it on the date that you rescinded this release?

A. Yes.

Q. Now, is that property now, or was it then, worth \$1000 or more?

A. Oh, yes.

Q. And could you have obtained more than \$1000 for it?

A. I could have gotten that without much trouble.

Q. And could you have borrowed \$1000?

A. Oh, yes."

There is no conflict in the evidence in regard to plaintiff's ability to pay should the occasion demand it. And, if there be a conflict, the foregoing evidence is sufficient to justify the inference of such ability on this appeal.

II.

PLAINTIFF'S RESCISSION WAS TIMELY AND HE WAS NOT GUILTY OF LACHES.

The question whether a rescission has been *timely* is one of fact. So too is the question of *excuse* or *delay* in rescinding.

King v. Mortimer, 83 A.C.A. 189, 195;

Cahill v. Superior Court, 145 Cal. 42.

Plaintiff was first aware of his permanent injury on February 13, 1946 (61). On August 30, 1946 he filed suit herein (2). On September 25, 1946 defendant filed its answer herein setting up as a bar to plaintiff's action, the release in question (8).

On November 25, 1947 plaintiff's counsel, on behalf of the plaintiff, mailed to counsel for defendant, a notice of rescission and offer to restore consideration to defendant (262). This offer to rescind was received by counsel for defendant as an *enclosure* of the letter (Plaintiff's Exhibit No. 5) admittedly received by counsel (261). The trial date was August 17, 1948 (11).

Section 2074 of the California Code of Civil Procedure provides:

"An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, *is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.*" (Emphasis added.)

Section 2076 of the same code provides:

"The person to whom a tender is made *must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; * * **" (Emphasis added.)

Consequently, defendant had from the date of receipt of plaintiff's letter, enclosing his notice of rescission and offer to restore the \$1050 to defendant,

until the trial date—a *period of eight and one-half months*—to raise any objections it might have had to the sufficiency of plaintiff's tender. Failing to do so, it is estopped to do so at this time.

“The question of promptness in the act of rescission, knowledge of the right to rescind and necessity to restore are all questions of fact * * *”

King v. Mortimer, 83 A.C.A. 189, 195.

There is no evidence that plaintiff was guilty of laches in rescinding after suit was filed; nor is there any evidence that by reason thereof defendant suffered damage or prejudice as a result of the time which elapsed between the signing of the release and of rescission.

Hind v. Silva (C.C.A. 9th), 75 F. (2d) 174;

Vice v. Thacker, 30 Cal. (2d) 84;

Carr v. Sacto Clay Prod. Co., 35 Cal. App. 439, 170 Pac. 446;

Matthews v. A. T. & S. F. R. Co., 54 Cal. App. (2d) 549, 129 P. (2d) 435;

O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334.

The question of retention of the consideration is *moot* for two reasons: (1) There was a valid rescission to which defendant offered no objection for a period of eight and one-half months; and (2) that plaintiff was *entitled* to retain the sum of \$1050 received from defendant as compensation for property damage and *known* personal injuries.

III and IV.

**THERE IS FACTUAL EVIDENCE OF MUTUAL MISTAKE
OR FRAUD.**

Reference is made to the statement of facts found on pages 3 through 7 of appellant's opening brief for a resume of these facts, with citations to the record to substantiate them, which amply justify an inference of either a mutual mistake or a deliberate fraud.

There is no dispute but that plaintiff had a pre-existing, non-disabling disc condition prior to the accident. Nor can there be a dispute as to the exacerbation of this condition into a *permanently* disabling one (236). Although the pain was severe, *plaintiff did not know* that his injuries were *permanent*. He relied upon Dr. Morrison's assurance that he would be "all right within 30 to 60 days" when he signed the release, believing that his pain and suffering were temporary only.

Therefore, it appears that both plaintiff and defendant's Dr. Morrison shared a *mistaken belief* that the condition of plaintiff's spine was *not serious*, but was such that any temporary disability resulting therefrom *would be of reasonably short duration*. On this showing, relief from the release must be granted.

Union Pac. R. R. Co. v. Zimmer, 87 A.C.A.
611, 617 (197 Pac. (2d) 363);
Steele v. Erie R. Co., 54 F. (2d) 688.

Counsel, on page ten of appellee's brief, advance the proposition that Dr. Morrison's statements to plaintiff "did not amount to any representations upon which

appellant was entitled to rely". That this is not a correct statement is disclosed by the rule set forth in the cases cited by appellant on pages 25, 26 and 27 of his opening brief, viz., that *a release for personal injuries is invalid where executed as a result of the attending surgeon's erroneous or false opinion concerning the physical condition of the releasor.*

If, under these facts, defendant denies the existence of a mistake on the part of defendant's Dr. Morrison in the diagnosis of plaintiff's injury, the only inference remaining is that the diagnosis was *fraudulent.*

Union Pac. R. R. Co. v. Zimmer, supra;

Matthews v. A. T. & S. F. R. Co., 54 Cal. App. (2d) 549, 558, 117 A.L.R. 1030.

V.

PLAINTIFF'S REAL INTENT IS SELF-EVIDENT.

By signing the release in question, the plaintiff's intent was to release the defendant from further liability as to a temporary injury arising from the accident, as was indicated by the statements made to him by defendant's Doctor Morrison, upon whom he relied.

Berry v. Struble, 20 Cal. App. (2d) 299, cited by appellee, is readily distinguishable from the instant case upon its facts. In the Berry case, there was no contention by the rescinding party that the facts attending the signing of the release gave rise to a mutual mistake or fraud. Here, the facts strongly indicate

both, hence it becomes a question of fact for the jury to determine what the intention of the parties was at the time of executing the release. Also, the release construed in the *Berry* case contained an express provision as to "all unknown and unanticipated injuries and damages" resulting from the accident. There is no such provision in the release signed by plaintiff.

Hudgins v. Standard Oil Co., 136 Cal. App. 44;
Leff v. Knewbow, 47 Cal. App. (2d) 360;
Matthews v. A. T. & S. F. R. Co., supra;
Megee v. Fasulis, 57 Cal. App. (2d) 275, 288.

In *Pacific Greyhound Lines v. Zane*, 160 Fed. (2d) 731, cited by appellee, *this court* (C.C.A. 9) construed a release which *expressly stated* that it waived the provisions of California Civil Code section 1542. Consequently, *this Court* held that in the absence of *actual fraud*, this type of release, *expressly mentioning and waiving* section 1542 of the Civil Code was valid. No such waiver is found in the release signed by plaintiff. Hence this case is also distinguished.

In *Union Pacific R. R. Co. v. Zimmer*, supra, a release almost identical to the one in question was construed by the California District Court of Appeal not to be a bar to plaintiff's action under the Federal Employers' Liability Act, that Court stating at page 615:

"It is well settled, however, that the mere fact that the release is extremely comprehensive in terms, and purports to be a complete discharge from all claims arising out of the accident, and is understood as such by the releasor, will not pre-

vent its avoidance where proper grounds therefor exist. (Tulsa City Lines v. Mains (2 Cir.) 107 F. (2d) 377, 381; Atlantic Greyhound Lines v. Metz (4 Cir.) 70 F. (2d) 166, 168; see also Bonici v. Standard Oil Co. (2 Cir.) 103 F. (2d) 437, 438; Southwest Pump & Machinery Co. v. Jones (8 Cir.) 87 F. (2d) 879; *Great Northern Ry. Co. v. Reid* (9 Cir.) 245 F. 86 (157 C.C.A. 382); Accord: *Hudgins v. Standard Oil Co.*, 136 Cal. App. 44 (28 P. (2d) 433); *Rider v Kansas City Terminal Ry Co.*, 112 Kan. 765 (212 P. 678).)" (Emphasis added.)

Substantially the same general form of release was considered in the following cases and held to be general. Defendant herein is a party to two of these cases and the *identical* form of release is therein construed and avoided.

Backus v. Session, 17 Cal. (2d) 380, 110 Pac. (2d) 51;

O'Meara v. Haiden, supra;

A. T. & S. F. R. Co. v. Peterson, 34 Ariz. 292, 271 Pac. 406;

Matthews v. A. T. & S. F. R. Co., supra.

VI.

THE UNCONTRADICTED EVIDENCE IS THAT THE DISABLING
CONDITION OF THE DEGENERATIVE DISC WAS CAUSED
BY THE ACCIDENT OF JULY 6, 1945.

Reference is made to Section V, page 9, of appellant's opening brief for a further discussion of this point.

Briefly, the evidence shows: that prior to the accident plaintiff was in good health (86); that he had been able, up to the time of the accident, to perform the duties of his job (87); that after the accident he *painfully* drove his car to his home (110; 243); that thereafter *his wife* drove the car (116; 118; 122); that he left defendant's hospital because the doctors there were not helping him (123); that he did not return to work, because unable to do so, until the day before, or the day of signing the release (58); that thereafter, off and on, for forty-five days he worked on passenger service with considerable pain and difficulty (59); that both medical witnesses who examined plaintiff testified that he was unable to perform his regular duties because of the exacerbation caused by the injury and that his condition was permanently disabling (148, 159, 169-170, 232-233, 236).

This evidence indicates conclusively that plaintiff suffered a permanent disability as a result of the accident.

That plaintiff was aware of the severe pain and impairment of his movements at the time of signing the release is undisputed. Counsel, however, chose to ignore the fact that Dr. Morrison at that time had advised plaintiff that he would be "all right" and could "return to work" and would be "all right within 30 to 60 days". Nor did plaintiff realize that this pain was a "flare-up" of a preexisting disc condition, because Dr. Morrison did not advise him of this situation and instead concealed it from him.

Dr. Niemand explains the plaintiff's present permanent difficulty in stating (169-170):

“Q. (By Mr. Baraty.) No, as a result of this accident here, to what extent would a rupture of a degenerative disc disable a man like that?

A. Well, suppose he had to carry out a 200 pound weight or something; he could lift that weight in carrying it out, but he would be incapacitated in lifting. He would increase the degeneration and increase the pain. He could do something that came up like that, but all he would be doing would be to increase the disability that he has, and therefore he would be incapacitated for any manual labor. So as a sensible process, or shall we say, a scientific process, you would not subject a man like this to that type of work or even to motion. I mean, every minute there is increasing the disability.”

If defendant's position in this regard is well taken, at most it presents only a conflict in the medical testimony which should be resolved by the jury—not by the trial Court as a matter of law. Such a conflict, if any there is, must be resolved in favor of appellant herein.

VII.

THE CONSIDERATION PAID TO PLAINTIFF UPON SIGNING THE RELEASE WAS NOT FAIR OR EQUITABLE IN THE LIGHT OF PLAINTIFF'S PERMANENT DISABILITY.

The consideration received by plaintiff was adequate for the temporary pain and suffering which plaintiff believed, and bargained for, at the time of

signing the release, would not extend beyond 30 to 60 days from the time he was so informed by Dr. Morrison.

Plaintiff does not dispute the “fairness” of the amount received when limited to the conditions which plaintiff was led to believe existed at the time he signed the release. However, when viewed in the light of plaintiff’s real and permanent injury it is manifestly inadequate and inequitable.

The question whether plaintiff’s “flare-up” was severe or ordinary—whether temporary or permanent—was a matter of fact which should have been submitted to the jury.

Callen v. Penn. Ry. Co., 68 Sup. Ct. 296, 332 U.S. 625, 92 L. Ed. 235.

Dr. Niemand’s testimony establishes that plaintiff’s condition prior to the accident was non-disabling; that at the time of signing the release he was permanently disabled and any subsequent labor on his part would be a further exacerbation thereof.

Dr. Niemand testified:

“Q. Would this man have any preexisting condition which would be disabling prior to the time of this accident?

A. No, not necessarily; he could have a degenerated disc without it necessarily being very disabling. It might not disable him. We could say that he might have—just by tying your shoelace like this (indicating), and you could fall off onto the floor, like I have had them, and sit on the floor and get a disc fractured. *Then it*

might not bother you for ten years, until some acute thing really starts more of that cracking together of the vertebrae (indicating). That is what happened in this case.” (148.) (Emphasis added.)

“A. In other words, this man could have had such a disability giving him very little trouble until an acute blow (indicating) which flares it up in a marked degreed.” (159.)

See also pages 169-170 of the record.

The so-called “evaluation” of the plaintiff’s flare-up by Dr. Soto-Hall (page 14, appellee’s brief) is based upon facts which are not in evidence or substantiated by the record, viz.:

“the fact that he was able to carry on for several months * * * if a man is able to continue with regular normal work for several months * * * from the fact that he went back to work, I would say that his flare up wasn’t too great; but I have granted that he could have a flare up as a result of the accident.” (239.)

The evidence shows that plaintiff did not return to work until on or about the date of signing the release (58); that he worked intermittently thereafter on a passenger job—not a freight train (128); that he worked for a period of only forty-five days (58, 59, 189); that during said period, he worked with great difficulty and pain and was unable to perform his duties because of the injury (58, 59).

Therefore, the foundation for Dr. Soto-Hall’s “evaluation” of plaintiff’s flare up rests upon facts

not in the record. Furthermore, this doctor testified that the fact that plaintiff, if he did, returned to work at all after the accident would not indicate there was *no* exacerbation of his injury, but “would be *helpful* in evaluating the *severity* of the exacerbation.” (239.)

The question of the extent of plaintiff’s exacerbation should have been submitted to the jury.

Matthews v. A. T. & S. F. R. Co., 54 Cal. App. (2d) 549;

Callen v. Penn. R. Co., *supra*.

VIII.

The trial Court’s opinion set forth in appellant’s brief, page 15, shows that Court’s erroneous basis for its ruling, viz., that there was “no question of fact that requires resolution by the jury” and “there is nothing for the jury to pass upon”.

Unquestionably, the trial Court completely disregarded the law set forth in the *Callen* case in directing the verdict for the defendant. The questions of fact presented by plaintiff should have been submitted to the jury, with proper instructions, and counsel given an opportunity to argue the issues of mutual mistake, fraud, rescission, invalidity of the release, and the nature and extent of plaintiff’s injury. Failure to do so was prejudicial error.

SUMMARY.

The failure of defendant to attempt to distinguish the facts of the instant case with the doctrines set forth in the *Callen, Wilkerson v. McCarthy, Union Pac. R. Co. v. Zimmer*, and other cases cited by appellant in his opening brief is significant, but understandable, because they establish conclusively that the trial Court committed reversible error in failing to submit to the jury the issues of fact presented herein.

CONCLUSION.

Because of the entire absence of conflict in the evidence to refute the issues of (1) mutual mistake; (2) applicability of section 1542 of the California Civil Code to the facts herein; (3) fraud and (4) rescission, if necessary; (5) validity of the release and (6) the nature and extent of plaintiff's disability, appellant respectfully urges that this Honorable Court instruct the District Court to order a new trial and to submit to the jury the single issue of the extent of plaintiff's damage, or, at least, to submit to a jury the questions of fact set forth herein.

Dated, San Francisco, California,
April 25, 1949.

Respectfully submitted,

PHILANDER BROOKS BEADLE,
ERNEST E. EMMONS, JR.,

Attorneys for Appellant.

No. 12,099

IN THE
United States Court of Appeals
For the Ninth Circuit

GEORGE H. GRAHAM,

Appellant,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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SEP 29 1949

PAUL P. O'BRIEN,
CLERK

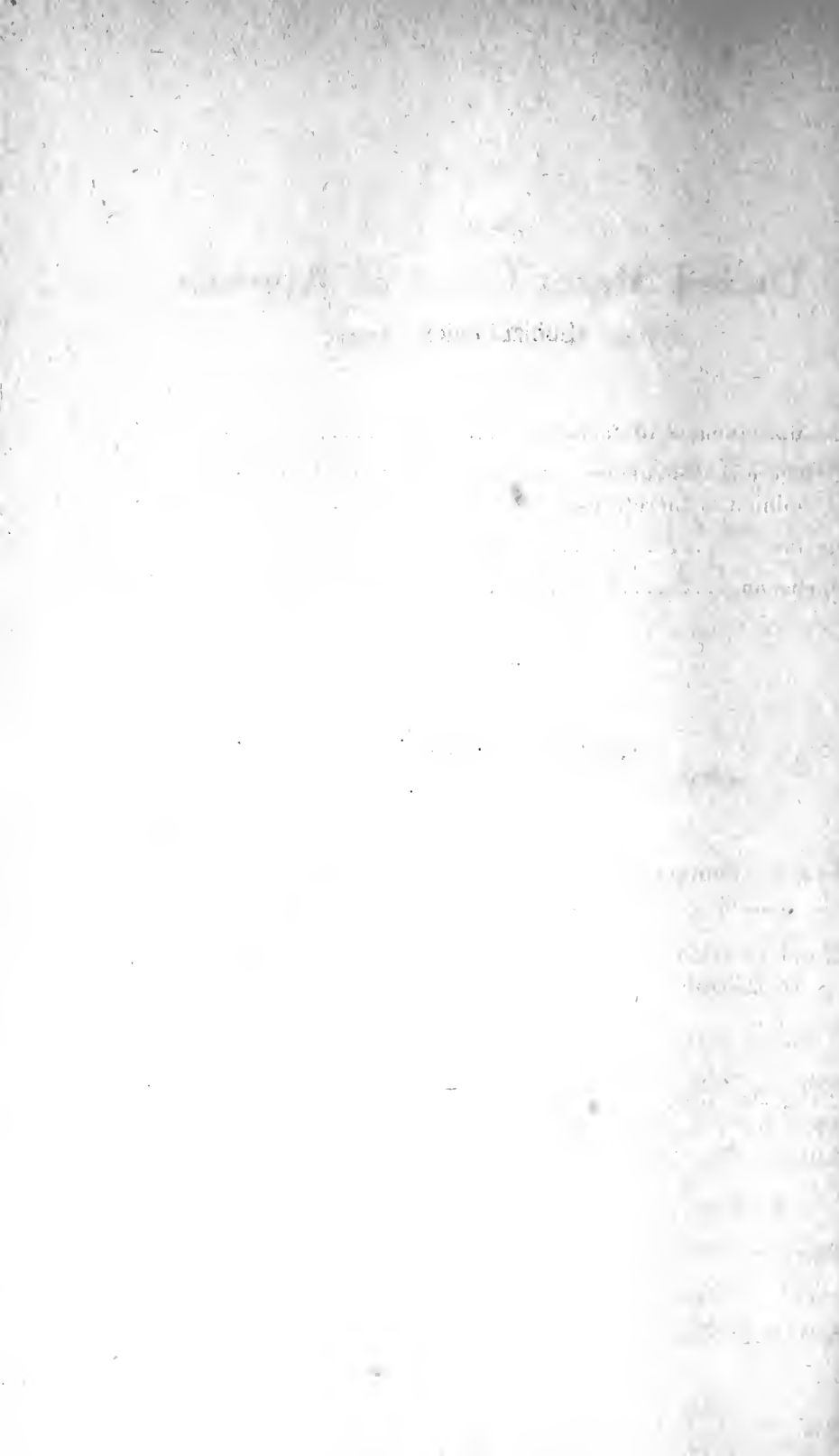


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No. 12,099

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GEORGE H. GRAHAM,

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Appellant,

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Appellee.

APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

The Atchison, Topeka and Santa Fe Railway Company hereby respectfully petitions for a rehearing of the decision rendered in the above entitled cause on August 30, 1949, upon the following grounds:

(1) That the opinion of the Court assumes or finds facts not warranted by the evidence.

(2) That the reversal of the judgment on a directed verdict in favor of defendant is against law.

A. MISSTATEMENT OF FACTS.

(1) The opinion (p. 2) states that Dr. Fenlon at Boulder City was "the company doctor".

In fact, Dr. Fenlon was a private physician of the plaintiff's own selection and was first consulted by plaintiff on July 9, 1945 (T.R. 43, 76, 77). This misstatement of fact is material to the issues here involved because plaintiff had first consulted his own private physician, Dr. Fenlon, on July 9, 1945 and continued to consult him, seeing him again on February 13, 1946 (T.R. 43, 76, 77). Plaintiff therefore had the benefit of independent medical advice both prior to the date of the release and thereafter.

(2) The opinion states that plaintiff suffered a crushed intervertebral disc and that this injury is traceable to the accident (Opinion, p. 10). The Court apparently based its decision reversing the judgment of the trial Court to a large degree upon the testimony that plaintiff did not know that he had a ruptured disc and upon the mistaken assumption that there was evidence that this ruptured disc is traceable to the accident. If we examine the transcript on this point there is no evidence which would justify the trial court in permitting a jury to speculate on the question of whether the injury to plaintiff's intervertebral disc was traceable to the accident. Plaintiff's medical expert, Dr. Niemand, first testified that he could not tell when the ruptured disc happened (T.R. 142, 143). Next, plaintiff's witness, Dr. Niemand, testified (T.R. 147) that the injury shown on the x-rays could have existed prior to the time of this

accident. On cross-examination Dr. Niemand testified (T.R. 154) that he could not say when the trauma occurred that caused the disc involvement. In response to a question as to whether he was able to say that plaintiff was hurt at the time he claims in this action before the court, Dr. Niemand replied (T.R. 155) "No, I can't tell you the date of that accident within we will say a reasonable time. I mean, I know it wouldn't go back that far." (This would seem to indicate that Dr. Niemand felt the trauma may have occurred subsequent to the date of the accident.) In response to a question as to whether the trauma which caused the disc condition could have occurred five years before the accident, Dr. Niemand answered (T.R. 157):

"A. More likely.

Q. More likely five years?

A. Maybe five, I don't know. It is hard to say. It is very difficult to say because it can come—you have to realize this—from such inconsequential trauma that the patient may not be aware of it until x-rays are taken."

Again in attempting to place the date of the trauma which caused the back condition in examining Dr. Niemand with reference to x-rays, the following questions and answers were given (T.R. 159):

"Q. A few years, so that in February of 1946, the calcification that you read on the film that is now in the box, in your opinion, would be a few years' duration?

A. Uh-huh, as far as I could ascertain."

The accident occurred on July 6, 1945. If the calcification was of a few years' duration it certainly predated the accident. Again (T.R. 160):

"Q. Doctor, do I understand you when you say that the calcification on the exhibit now in the shadow box in your opinion is of a few years' duration prior to the taking of that x-ray film?

A. Yes."

The x-ray film was taken February 13, 1946 by plaintiff's own doctor, Dr. Fenlon (T.R. 158, 160). The foregoing is the only testimony of plaintiff's medical expert as to the date of the trauma which caused the crushed disc from which plaintiff complained and certainly would not justify a jury in finding that the crushed disc was suffered in an accident in July, 1945.

The defendant's medical expert, Dr. Soto-Hall, who was called out of turn, testified:

"There is no question that the degenerative disc pre-existed that date, '45. That is a condition of very long standing; there is no question about it." (T.R. 228, 229).

On the basis of the foregoing evidence we submit that the opinion of this Honorable Court is in error when it finds that there was evidence that the injured disc was traceable to the accident. There could be neither fraud nor mutual mistake with reference to this disc when it is conceded by all medical experts who testified that the disc condition existed prior to the accident.

(3) The opinion (pp. 5, 6) states that at the conclusion of plaintiff's case defendant offered as its only witness Dr. Ralph Soto-Hall.

Dr. Soto-Hall was called as a witness by the defendant prior to the conclusion of the plaintiff's case. He was called out of order with the consent of counsel and as an accommodation to the doctor, who was present in court (T.R. 219, 220). Upon the conclusion of his testimony the plaintiff then resumed his case and further testimony by plaintiff and another witness on his behalf followed (T.R. 240). Plaintiff's motion for a directed verdict was made at the conclusion of plaintiff's case.

**B. THERE IS NO EVIDENCE OF FRAUD OR MUTUAL MISTAKE
AND THE OPINION IS THEREFORE AGAINST LAW.**

Plaintiff employed Dr. Fenlon as his own physician on July 9, 1945 (T.R. 43, 77) and he was tended by that doctor from that date up to as late as February 13, 1946 (T.R. 59). In the intervening time plaintiff accepted the hospital and medical services for which he was entitled as a member of the Santa Fe Hospital Association, and when he was discharged from the Santa Fe Hospital and probably still under observation of his own personal physician (T.R. 46, 47), it was with the statement ascribed to Dr. Morrison "Well, he told me to go back to work if I possibly could * * * " (T.R. 47), and after signing the release plaintiff did go back to work, and his services were thereafter terminated, not because of inability to perform his duties.

The settlement: Plaintiff was as well informed of his condition as the defendant. In fact, the matter of his ability to perform services was left entirely in the plaintiff's hands; it was for him to determine whether he felt equal to returning to work. Thereupon he went to the office of the Claims Department of his own volition (T.R. 177), no one invited him there, and he went to see what could be done; there is not one bit of testimony as to what transpired when the release was signed and the check delivered, other than that the sum of \$1,000.00 was offered in settlement and Mr. Graham suggested that he had broken two pairs of glasses and he was paid \$50.00 more because of the property damage (T.R. 57). This was a disputed claim in all of its aspects. The plaintiff was not laboring under any disability, nor was he threatened or coerced. If there had been any such conduct plaintiff would have been the first to so testify at the trial.

The release is in large print, and over the signature of plaintiff in his own handwriting appears the words, "I have read above release and understand same." (T.R. 180). The printed words of the release contain this statement, "In making this settlement I am not relying upon any statement made by any agent or physician of said railroad company as to what my injuries are, or how serious they are, or when or to what extent I may recover therefrom." (T.R. 179). When we consider these facts with the only possible conclusion from the evidence that the disc condition existed at the time of the accident, this is not a case of fraud, mutual mistake or undue influence.

The attempted rescission: The evidence of plaintiff as to the ability to restore the consideration received, is so evasive and uncertain, except in the one instance when the words were placed into his mouth by his own counsel, that they cannot be accepted as truthful, substantial evidence (T.R. 181-182-183-184-185-186).

THE LAW.

Petitioner's brief as appellee fully considers the applicable law but we submit the following additional discussion for the court's consideration.

The trial court had the benefit of viewing the plaintiff on the witness stand and observing his demeanor; had there been a verdict at the conclusion of the defendant's evidence, in favor of the plaintiff, the trial court, if it disbelieved the plaintiff's testimony concerning the release and rescission, could have granted a new trial and because of the uncertainty and insufficiency of plaintiff's alleged claim such a decision would have to be sustained.

The burden of proof on the subject of the release and the rescission was with the plaintiff.

In 22 *Cal. Jur.* 766, Para. 15, it is stated:

“A written release is presumptive evidence of a good consideration, and the burden of showing a want of consideration is upon the party seeking to invalidate or avoid it. Indeed, the trial judge is not bound to believe an interested witness as against such a presumption if it satisfies his mind.

The burden is upon the releasor to show that the release was procured by fraud."

The Supreme Court of the United States, in the case of *Patton v. Texas & Pacific Railway Co.*, 179 U.S. 658 (21 S.Ct. 275, L.Ed. 361) at page 363 (45 L.Ed.) states:

"That there are times when it is proper for a court to direct a verdict is clear. 'It is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it,'"—citing cases * * *

"Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate

court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions.”

It has been held also by the Supreme Court of the United States in the case of *Brady v. Southern Railway Company*, 320 U.S. 476 (88 L.Ed. 239), that more than a scintilla of evidence is required in an action against a railroad company under the Federal Employers’ Liability Act before the case may be properly left to the discretion of a jury, and that by directing a verdict the result of a trial is saved from the mischance of speculation over legally unfounded claims. At page 243, 88 L.Ed., the court said,

“But when a state’s jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers’ Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury,” citing cases.

As far as we have been able to search and ascertain, this case regarding “scintilla of evidence” has not been overruled by the Supreme Court of the United States.

Should this decision be permitted to stand, no railroad company can ever feel secure in settling a claim of one of its employees. Such an agreement would always be open to question by a plaintiff and would be permitted to go to a jury after the completion of

the entire case, with the possibility always that an adverse decision to the defendant could be set aside on motion for insufficiency of evidence; and this after a lengthy and expensive trial.

CONCLUSION.

Petitioner respectfully prays that a rehearing be granted herein upon the ground that material facts are misstated in the opinion of the court and the opinion rendered is against law, and upon such rehearing respectfully requests that the judgment of the trial court be affirmed.

Dated, San Francisco, California,
September 28, 1949.

Respectfully submitted,

ROBERT W. WALKER,

GUS L. BARATY,

GEORGE A. SMITH,

*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
September 28, 1949.

GUS L. BARATY,
*Of Counsel for Appellee
and Petitioner.*





